CASES

ON THE

LAW OF PARTNERSHIP

INCLUDING LIMITED PARTNERSHIPS

SELECTED FROM DECISIONS OF

ENGLISH AND AMERICAN COURTS

BY

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AMERICAN CASEBOOK SERIES
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THE AMERICAN CASEBOOK SERIES

THE first of the American Casebook Series, Mikell's Cases on Criminal Law, issued in December, 1908, contained in its preface an able argument by Mr. James Brown Scott, the General Editor of the Series, in favor of the case method of law teaching. Until 1915 this preface appeared in each of the volumes published in the series. But the teachers of law have moved onward, and the argument that was necessary in 1908 has now become needless. That such is the case becomes strikingly manifest to one examining three important documents that fittingly mark the progress of legal education in America. In 1893 the United States Bureau of Education published a report on Legal Education prepared by the American Bar Association's Committee on Legal Education, and manifestly the work of that Committee's accomplished chairman, William G. Hammond, in which the three methods of teaching law then in vogue—that is, by lectures, by text-book, and by selected cases—were described and commented upon, but without indication of preference. The next report of the Bureau of Education dealing with legal education, published in 1914, contains these unequivocal statements:

"To-day the case method forms the principal, if not the exclusive, method of teaching in nearly all of the stronger law schools of the country. Lectures on special subjects are of course still delivered in all law schools, and this doubtless always will be the case. But for staple instruction in the important branches of common law the case has proved itself as the best available material for use practically everywhere. * * * The case method is to-day the principal method of instruction in the great majority of the schools of this country."

But the most striking evidence of the present stage of development of legal instruction in American Law Schools is to be found in the special report, made by Professor Redlich to the Carnegie Foundation for the Advancement of Teaching, on "The Case Method in American Law Schools." Professor Redlich, of the Faculty of Law in the University of Vienna, was brought to this country to make a special study of methods of legal instruction in the United States from the standpoint of one free from those prejudices necessarily engendered in American teachers through their relation to the struggle for supremacy so long, and at one time so vehemently, waged among the rival systems. From this masterly report, so replete with brilliant analysis and discriminating comment, the following brief extracts are taken. Speaking of the text-book method Professor Redlich says:

"The principles are laid down in the text-book and in the professor's lectures, ready made and neatly rounded, the predigested essence

of many judicial decisions. The pupil has simply to accept them and to inscribe them so far as possible in his memory. In this way the scientific element of instruction is apparently excluded from the very first. Even though the representatives of this instruction certainly do regard law as a science—that is to say, as a system of thought, a grouping of concepts to be satisfactorily explained by historical research and logical deduction—they are not willing to teach this science, but only its results. The inevitable danger which appears to accompany this method of teaching is that of developing a mechanical, superficial instruction in abstract maxims, instead of a genuine intellectual probing of the subject-matter of the law, fulfilling the requirements of a science."

Turning to the case method Professor Redlich comments as follows:

"It emphasizes the scientific character of legal thought; it goes now a step further, however, and demands that law, just because it is a science, must also be taught scientifically. From this point of view it very properly rejects the elementary school type of existing legal education as inadequate to develop the specific legal mode of thinking, as inadequate to make the basis, the logical foundation, of the separate legal principles really intelligible to the students. Consequently, as the method was developed, it laid the main emphasis upon precisely that aspect of the training which the older text-book school entirely neglected—the training of the student in intellectual independence, in individual thinking, in digging out the principles through penetrating analysis of the material found within separate cases; material which contains, all mixed in with one another, both the facts, as life creates them, which generate the law, and at the same time rules of the law itself, component parts of the general system. In the fact that, as has been said before, it has actually accomplished this purpose, lies the great success of the case method. For it really teaches the pupil to think in the way that any practical lawyer—whether dealing with written or with unwritten law—ought to and has to think. It prepares the student in precisely the way which, in a country of case law, leads to full powers of legal understanding and legal acumen; that is to say, by making the law pupil familiar with the law through incessant practice in the analysis of law cases, where the concepts, principles, and rules of Anglo-American law are recorded, not as dry abstractions, but as cardinal realities in the inexhaustibly rich, ceaselessly fluctuating, social and economic life of man. Thus in the modern American law school professional practice is preceded by a genuine course of study, the methods of which are perfectly adapted to the nature of the common law."

The general purpose and scope of this series were clearly stated in the original announcement:

"The General Editor takes pleasure in announcing a series of scholarly casebooks, prepared with special reference to the needs and limi-

tations of the classroom, on the fundamental subjects of legal education, which, through a judicious rearrangement of emphasis, shall provide adequate training combined with a thorough knowledge of the general principles of the subject. The collection will develop the law historically and scientifically; English cases will give the origin and development of the law in England; American cases will trace its expansion and modification in America; notes and annotations will suggest phases omitted in the printed case. Cumulative references will be avoided, for the footnote may not hope to rival the digest. The law will thus be presented as an organic growth, and the necessary connection between the past and the present will be obvious.

"The importance and difficulty of the subject as well as the time that can properly be devoted to it will be carefully considered so that each book may be completed within the time allotted to the particular subject. * * * If it be granted that all, or nearly all, the studies required for admission to the bar should be studied in course by every student—and the soundness of this contention can hardly be seriously doubted—it follows necessarily that the preparation and publication of collections of cases exactly adapted to the purpose would be a genuine and by no means unimportant service to the cause of legal education. And this result can best be obtained by the preparation of a systematic series of casebooks constructed upon a uniform plan under the supervision of an editor in chief. * * *

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Since this announcement of the Series was first made there have been published books on the following subjects:

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Casebooks on other subjects are in preparation.

It is earnestly hoped and believed that the books thus far published in this series, with the sincere purpose of furthering scientific training in the law, have not been without their influence in bringing about a fuller understanding and a wider use of the case method.

William R. Vance,
General Editor.

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CASES ON PARTNERSHIP.

CHAPTER I.

WHAT CONSTITUTES A PARTNERSHIP.

SECTION 1.—PARTNERSHIP INTER SE—TRUE PARTNERSHIP.

HOARE v. DAWES.

(Court of King's Bench, 1780. 1 Doug. 371.)

Defendants and others employed Contencin, a broker, to purchase a lot of tea, each party, including the broker, taking a certain share of the whole amount purchased, the lots being too large for any one dealer. The practice was for those desiring to join in the purchase to give orders or warrants to the broker for the delivery of the quantity purchased on payment being made. These warrants were often pledged and money raised on them. The broker in this case, having pledged the warrants given him for a loan from plaintiff, became bankrupt. The price of tea having fallen in the meantime, plaintiff was unable to realize from the warrants the amount of the loan. He brought the present action against all the defendants, on the ground that all the parties interested in the purchase were to be considered as partners and jointly and severally liable for the whole purchase. Each defendant had fully paid for his share of the whole purchase which he had agreed to take. There was no agreement between the parties as to the redisposal of the tea.

Verdict for defendant, and rule nisi for a new trial.

Lord Mansfield. I considered this, at first, as a case of dormant partners. The law with respect to them is not disputed, viz., that they are liable when discovered, because they would otherwise receive usurious interest without any risk; but towards the end of the cause the nature of the transaction, and of these loans, was more clearly explained, and I was satisfied with the verdict, and am now confirmed in my opinion. The evidence of Cartony is irrelevant, because he said the broker borrowed the money for him; and, besides, he did not dispute the demand. Is this a partnership between the buyers?

I think it is not; but merely an undertaking with the broker by each for a particular quantity. There is no undertaking by one to advance money for another, nor any agreement to share with one another in the profit or loss. The broker undertakes to buy and sell, but makes no advance without the security of the tea warrants, which are considered as cash, and pass by delivery, like East India bonds. These warrants are pawned with the lender, but the broker has no power to pledge the personal security of the principals. He cannot sell the warrants, and borrow more money on such personal security. It makes no difference whether specific tea or the warrants are delivered at the sale. It would be most dangerous, if the credit of a person, who engages for a fortieth part, for instance, should be considered as bond for all the other 39 parts. Non hæc in fœdera veni. The witnesses did not merely speak to opinion, but to matter of fact, and their own dealings. They said the money was lent to the broker alone. Sometimes, indeed, lenders have required to know the principals. They did not trust the broker alone; but all others who do not ask after the principals do. The note is given as a collateral security personally by the holder of the warrant, not in the character of a partner with other persons, nor as a broker for them.

WILLES and ASHHURST, JJ., of the same opinion.

BULLER, J. This is a very plain case. The plaintiffs had no reason to consider the broker as a partner with the other persons; for, though he had a share, he did not act or appear as a partner, nor were they partners as among themselves. They had never met or contracted together as partners. If this transaction were sufficient to constitute a partnership, a broker would have it in his power to make 500 persons partners, who had never seen nor heard of one another, or might, at his pleasure, convert his principals into partners, or not, without any authority from them, by taking joint or separate warrants.

The rule discharged.

HESKETH v. BLANCHARD et al.

(Court of King's Bench, 1803. 4 East, 144.)

This was an action for goods sold and delivered, and on the common money counts. The defendant pleaded the general issue, and paid £50 into court upon the count for goods sold and delivered, which was laid out of the question in the ultimate consideration of the case. With respect to the count for money paid, laid out, and expended by the plaintiff for the use of the testator, the case appeared to be this: The plaintiff was a draper and tailor, with whom the testator, who had been a captain of a vessel in the African trade, had had dealings for several years. In the spring of 1800 the plaintiff applied to Robertson, who was then about to sail for the coast of Africa, for

orders, who declined giving him any, saying he knew of something else which would answer better; but as he had no sufficient credit for himself, nor ready money, he requested the plaintiff to go with him to one Corfe, a butcher, and order certain quantities of beef and tripe to take with him on the voyage, promising that if any profit should arise from them the plaintiff should have one-half for his trouble. Corfe accordingly furnished the articles, to the value of £75, and sent them on board Robertson's ship by the desire of the plaintiff and Robertson, both of whom he made debtors for the goods; and, being examined as a witness at the trial, he also swore that he would not have trusted Robertson alone. After the goods were shipped, Robertson desired the plaintiff to make an insurance. The plaintiff afterwards paid Corfe the whole sum; and Robertson being since dead, without having come to any settlement with the plaintiff, he brought this action to recover the money so paid. At the trial before Rooke, J., at the last Lancaster Assizes, it was objected by the defendant's counsel that as the parties were to divide the profits, if any, they must necessarily be equally liable to any loss, and therefore, the agreement constituting a partnership, the action was not maintainable by one partner against the other. To this it was answered, on the part of the plaintiff, that it was not a connection of profit and loss, but a simple payment of money for the use of another, upon an undertaking by that other to pay him half the profit of a certain adventure, supposing it to be successful, and that, though the plaintiff had made himself responsible to Corfe for the value of the articles furnished upon his credit jointly with that of Robertson, yet as between themselves, or in any other respect, there was no partnership. It was thereupon agreed to take the opinion of this court upon the point; and the jury were accordingly directed to find a verdict for the plaintiff for £75 subject to the opinion of this court whether the plaintiff were entitled to recover the whole or a moiety, and if the court should be of opinion that he was not entitled to recover anything a nonsuit was to be entered.

Park and Wood, who were to have shown cause against a rule for entering a nonsuit, after stating the facts of the case, and making the distinction above noticed, were stopped by the court.

Topping and F. Clarke, contra, said that there might be a partnership in a particular transaction or adventure, as well as in a general trade, and this was of the former kind. That in Grace v. Smith, 2 Bl. 998, the transaction between Smith and one Robinson, who had individually contracted the debt for which the action was brought, was holden not to be a partnership, because the share which Smith was to receive was not payable out of the profits of the trade, but was a personal demand on Robinson; whereas here the agreement was in terms for the plaintiff to have one-half of the profit of the adventure. And this principle was not controverted by Lord C. J. Eyre in Waugh v. Carver, 2 H. Bl. 235, and vide Morse v. Wilson, 4 Term Rep.

353, though the distinction was taken with respect to agreements which would constitute a partnership with respect to creditors, though not as between the parties themselves. But there the parties had expressly stipulated between themselves not to be answerable for each other's losses, which showed that their intention was not to become partners. Here there was no such stipulation, and therefore no such intention can be inferred, and then by the general operations of law upon their agreement they were constituted partners.

Lord ELLENBOROUGH, C. J. The distinction taken in Waugh v. Carver et al., applies to this case. Quoad third persons it was a partnership, for the plaintiff was to share half the profits; but as between themselves it was only an agreement for so much as a compensation for the plaintiff's trouble, and for lending Robertson his credit. Vide Wilkinson v. Frasier, 4 Esp. 182; Dry v. Boswell, 1 Campb. 329; Muzzy v. Whitney, 10 Johns. (N. Y.) 226.

PER CURIAM. Rule discharged generally.

Ex parte BRIGGS.

In re NOTLEY.

(Court of Review and on Appeal before the Lord Chancellor, 1833. 3 Deac. & Ch. 367.)

This was an appeal by Miss Briggs, a petitioning creditor in a bankruptcy proceeding against one Notley, from a decision refusing to admit the proof of her debt, on the ground that it arose out of a partnership between her and the bankrupt.

There was also a petition by the bankrupt to annul the bankruptcy proceedings on the same ground.

ERSKINE, C. J. * * * The undisputed facts are these: Miss Briggs advanced £230 to the bankrupt, on a bond and warrant of attorney for securing the repayment on the 2d November, 1837, with interest at £5 per cent. This money was advanced to the bankrupt for the purpose of enabling him to establish a manufactory for chocolate. It is said that this is not a good petitioning creditor's debt, as there was, besides the written documents, an agreement that Miss Briggs was to share in the profits of the manufactory, and that the loan, therefore, must be considered as a debt arising out of the partnership. Now, I have always understood the distinction to be this: If the transaction between two partners is intended to form an item in the partnership accounts, then you cannot say that there is a legal debt owing from one to the other until a balance is struck, after taking the partnership accounts. But after an account has been taken, and a balance struck, then, although the partnership continues, the amount of the balance will be provable under a commission, or be a good petitioning creditor's debt. The cases in which the objection

of a partnership has been allowed to prevail are those in which money is actually brought into the partnership account, and where it would depend, upon taking the account, whether the sum was due or not from one partner to the other. But in this case I think there is not sufficient evidence of partnership. Conceding, however, that there was a partnership, the debt here is perfectly distinct from any partnership accounts. Although Miss Briggs was promised an eighth share of the profits, this engagement appears to have been made after the loan of the money, and was not stipulated for by her previous to the advance of the money. The money was to be repaid at all events, and there is nothing to show that it was intended to form an item in any partnership accounts. It is clear, therefore, that there was no contemplation of a partnership between these parties, but that the real object of Miss Briggs was to obtain, if she was able, more interest than £5 per cent.

Sir J. Cross. This is a petition of the bankrupt to supersede the fiat, on the ground that the petitioning creditor was his partner in trade. But, as his honor the Chief Judge has already stated, there was no contemplation of any partnership in fact. It is true that, if B. agrees to give A. a share in the profits of his business, the court may consider them quasi partners for all purposes of responsibility to third persons. But B., after borrowing money of A., cannot turn round upon him and say, "You are my partner, by operation of law, and therefore I will not pay you your debt." This would not be permitted by any court, either of law or equity. But, even if there was a partnership between these parties, I think that this debt was independent of any partnership transaction, and is quite sufficient to enable a petitioning creditor to sustain a fiat. It appears to me, however, that there was no partnership in fact.

Petition dismissed.

SODIKER v. APPLEGATE.

(Supreme Court of West Virginia, 1884. 24 W. Va. 411, 49 Am. Rep. 252.)

Snyder, J. Suit in equity, brought by William Sodiker against Lewis Applegate, in June, 1879, in the circuit court of Brooks county, to settle the accounts of an alleged partnership between the plaintiff and defendant for running a grist and flour mill, buying and selling grain and products of said mill. The bill avers that by the terms of the partnership the defendant was to furnish the gristmill then owned by him and put it in repair at his own expense, the plaintiff was to run and operate the mill, the funds for carrying on the business and keeping the mill in repair were to be furnished by the parties in equal portions, and the profits to be shared equally between them.

The defendant in his answer positively denies that any partnership of any kind existed between him and the plaintiff. He avers that

while the plaintiff worked at his mill he did so as a hired hand. Being without means and penniless, he was employed to run the mill so long as he might do so satisfactory to the defendant and the customers of the mill. The cause was referred to a commissioner for an account, depositions taken, and the commissioner reported that in his opinion no partnership existed; but, if the court should decide that the proofs established a partnership, he reported due to the plaintiff $126.87.

The plaintiff excepted to that part of the report which found that no partnership existed, and the court by its decree of June 14, 1883, sustained the said exception and decreed that the plaintiff recover from the defendant the said sum of $126.87 and costs. From this decree the defendant appealed.

It is apparent from the evidence in this cause that no partnership existed. The only agreement between the plaintiff and defendant is stated by the plaintiff when he says: "My agreement was: Mr. Applegate was to furnish me a house to live in, and I was to have the half. It was to be half and half between us. Inside repairs of the mill were to be done by me, and half of the expenses to be paid by each. Outside repairs to be paid by Lewis Applegate. There was no agreement between us as to losses."

The evident meaning of this language, as shown by the other testimony and facts, is that the plaintiff was employed by the defendant to take charge of his mill as miller, and for his services in that behalf the plaintiff was to receive one-half the tolls or earnings of the mill. The half of the earnings or profits to which the plaintiff thus became entitled did not make him a partner This merely constituted the manner of payment and the measure of his compensation for his services as miller.

To constitute a partnership between the parties who share in the profits, the interest in the profits must be mutual; that is, each person must have a specific interest in the profits as a principal trader. He is not a partner if he merely receives out of the profits a compensation for his services as an agent, employé or servant. Collyer on Partn. § 31. Thus, where A. purchased goods for an adventure on the credit of B., and it was agreed "that, if any profits should arise from them, B. should have one-half for his trouble, it was held that this was not a partnership between the parties." Hesketh v. Blanchard, 4 East, 144. In all cases there must be a participation as principal. If the persons merely occupy the relation of principal and agent, employer and employé, or factor, no partnership can be predicated upon the fact that such agent, employé, or factor receives a part or share of the profits for his services or other benefits conferred. This proposition is illustrated by numerous cases, among which are the following: Berthold v. Goldsmith, 24 How (U S.) 542, 16 L. Ed. 762; Burckle v. Eckhart, 1 Denio (N. Y.) 341; Bowyer v. Anderson, 2 Leigh (Va.) 550; Chapline v. Conant, 3 W. Va. 507, 100 Am. Dec.

766; Dils' Adm'r v. Bridge, 23 W. Va. 20; Hanna v. Flint, 14 Cal. 73; Morgan v. Stearns, 41 Vt. 398.

In every partnership there is a community of interest, but every community of interest does not create a partnership. There must be a joint ownership of the partnership funds, or a joint right of control over them, and also an agreement to share profits and losses arising therefrom. Thus an agreement between A. and B. that A. shall work B.'s farm upon shares and divide the produce does not constitute them partners inter sese, or as to third persons. Putnam v. Wise, 1 Hill (N. Y.) 234, 37 Am. Dec. 309. Nor are the owners of real estate who contract with mechanics to build a mill or other building upon their land partners inter sese; but either party, paying more than his share of the expense of the construction, may recover such excess of the other owner in assumpsit. Porter v. McClure, 15 Wend. (N. Y.) 187.

It is unnecessary to illustrate further what particular facts and agreements do or do not constitute a partnership. The books are full of nice distinctions and definitions, showing that it is often difficult to decide to which class the particular facts and circumstances assign cases. In the case before us, however, there is no such difficulty. Under none of the authorities or definitions could this be classed as a partnership.

I am therefore of opinion that the decree complained of must be reversed, with costs to the appellant, and the plaintiff's bill dismissed, with costs.

Reversed.

SECTION 2.—INTENTION TO BE PARTNERS.

ZUBER v. ROBERTS.

(Supreme Court of Alabama, 1906. 147 Ala. 512, 40 South. 319.)

Bill by R. B. Zuber against Paul Roberts. From a decree in favor of defendant, plaintiff appeals. Affirmed.

DOWDELL, J. The bill in this case is filed for the purpose of a settlement of an alleged partnership between the complainant and respondent. The respondent, by his answer, denies the allegations of the bill as to the existence of any partnership between the parties. There was no contract in writing, and there was no express agreement between the parties for the creation of a partnership; and the determination of this question must be had from the terms of the agreement entered into between the parties, the character and conduct of the business, and the intention of the parties, to be gathered from the circumstances attending the entire transaction.

In 1900 Paul Roberts obtained a lease for the Alabama Consolidated Coal & Iron Company on a limestone quarry and entered into a contract to furnish said company with 200 tons of limestone a day for a term of three years. At this time the appellee was superintendent of the Alabama Consolidated Coal & Iron Company's furnace at Ironaton, Ala., and the appellant was an employé of said company under the appellee as superintendent. An agreement was subsequently entered into between the parties, whereby the appellee was to furnish the capital for the equipment of the quarry and for stocking a commissary, etc., and the appellant was to manage the quarry and commissary, and for his services was to receive one-half of the profits derived from the quarrying of stone and one-half of the profits from the commissary, and, as the appellant states in his testimony, one-half of the rents collected on houses on the quarry premises. Operations were conducted under this arrangement for about two years, when the appellee made a contract with the Alabama Consolidated Coal & Iron Company whereby he surrendered his lease and canceled the contract for the supply of limestone during the unexpired time. He was paid a sum of money by the Alabama Consolidated Coal & Iron Company for the surrender of his lease and cancellation of the contract, and the appellant thereupon filed his bill for a settlement of the alleged partnership, claiming that he was entitled to participate equally with appellee in the sum received by appellee for the cancellation of the contract and the surrender of the lease, all of which the appellee denies, and appellee claims that the business was his alone, and that a division of the profits was only an adopted method of fixing the compensation of appellant for his services as manager of the business.

The evidence shows that the business was conducted in the name of Paul Roberts, or in the name of the "Consolidated Quarry," which latter name was used by appellee for the convenience of the Alabama Consolidated Coal & Iron Company in the keeping of their accounts, and not as a partnership name. The appellant claims and testifies that the name of "Roberts & Zuber" was used in conducting the quarry business, and the evidence shows that the appellant had some bills of lading for lime rock made out in the name of Roberts & Zuber. The appellee, on the other hand, testified that he did not authorize or consent to the use of such name, and, upon being informed that such name was being used, he notified the agent of the railroad company and the clerk in the commissary, who made out the bills of lading, that the bills should not be so made. The evidence further shows that the goods for the commissary were purchased in the name of Paul Roberts, and, as shown by sundry exhibits attached to the deposition of Paul Roberts, the complainant, Zuber, would order goods for the commissary, signing the name "Paul Roberts per R. B. Zuber," on the paper of the "Consolidated Company," which had the names "Paul Roberts, Proprietor," and "R. B. Zuber, Mgr.," printed thereon.

The account for lime rock shipped to the Alabama Consolidated Coal & Iron Company was kept in the name of Paul Roberts, and all settlements were made with Paul Roberts by checks drawn to his account. The capital for conducting the business was all furnished by the appellee. The lease on the quarry and the contract for the furnishing of stone, which made the business possible, were the property of the appellee, and were never by him transferred or assigned in any way to the appellant, in whole or in part. On the other hand, the appellant contributed to the arrangement only his services as manager, and for such services received, instead of a stipulated salary, one-half of the net profits. The appellant himself testifies that the agreement was that the appellee should put up the money in lieu of appellant's services, and certain profits were to be divided between them.

While the evidence shows a community of interest in the profits, it does not satisfactorily show that under the arrangement and conduct of the business there was to be any community in the losses. The appellant contends that the fact, which is undisputed, that he bore his part of the loss in the payment of damages for an injury suffered by one of the employés working in the quarry mines goes to prove that he was not only to share in profits, but in the losses of the business as well, and therefore he was a partner. As to this matter, the evidence shows that at the time the appellant objected to paying any part of said loss, and the evidence further explains why he consented to pay one-half, and this was not upon the ground of any partnership liability. The facts in the present case are very much like those in the case of Tayloe v. Bush, 75 Ala. 432, where there was a contract for the conduct of a farm; the agreement providing that one party should furnish the farm and certain stock, tools, etc., the other to conduct it, keep an account of all expenses, and to make equal division of the net proceeds. It was said in that case: "In determining whether a partnership was created, the intention of the parties is the single question for consideration. There is a well-recognized distinction between cases where third persons have dealt with parties, associated in business as partners, and controversies between the parties themselves, or controversies in which the rights of such persons are not involved. In the one class of cases, a partnership may arise by mere operation of law, without an inquiry into or in direct opposition to the expressed intention of the parties. In the other class of cases, the question is as to the intention of the parties. * * * The test of a partnership generally is whether there is a community of interests, a participation in losses and profits. Howze v. Patterson, 53 Ala. 205, 25 Am. Rep. 607; Autrey v. Frieze, 59 Ala. 587. The rule is not without its exceptions; and when a party is without interest in the capital or business and is to be compensated for his services from the profits, or rewarded by the profits or what is to depend upon the result of an adventure or enterprise, the rule is without application. This contract is within the exception. The participation of Thomas

in the profits was simply intended as compensation to him for his skill and services as the manager of the stock and plantation and in the cultivation and gathering of the crops." Again it is said in Stafford v. Sibley, 106 Ala. 192, 17 South. 324: "An agreement by which one is to share in the profits alone does not create a partnership. The agreement should bind the parties to share the burden of losses. One who is to receive for his share a percentage of net profits, and if there are no profits is to be paid nothing, in one sense is affected by losses; but if by the agreement he is to contribute nothing to make good the losses, if he is under no legal liability therefor, he does not bear the burden of loss in its legal signification as an element of partnership."

Applying this law to the facts in this case, as we gather them from the evidence, we are of the opinion that no partnership existed between the parties. To our minds, the weight of the evidence shows that it was never the intention of the parties to create a partnership, and that the agreement to divide the profits was only a mode, adopted by the parties, in fixing the appellant's compensation for the services which he was to render. It follows, therefore, that the decree appealed from must be affirmed.

Affirmed.

BRADLEY et al. v. ELY.

(Appellate Court of Indiana, 1900. 24 Ind. App. 2, 56 N. E. 44, 79 Am St. Rep. 251.)

COMSTOCK, C. J. The appellee, plaintiff below, sued James L. Hargis and James L. Bradley as partners as J. L. Hargis & Co. The complaint was in two paragraphs. The first was on a promissory note executed by J. L. Hargis & Co. to the appellee. The second was for money had and received to the use and benefit of the defendants, and to pay off an indebtedness incurred in the operation and management of a large farm operated, as alleged, by the defendants as partners. Appellant filed his sworn answer to the complaint in general denial. The finding and judgment of the court was for the appellant on the first paragraph of the complaint, and against Bradley and Hargis on the second paragraph. Bradley alone appeals. The error assigned is the action of the court in overruling appellant's motion for a new trial. Among the reasons specified in the motion for a new trial are "that the finding is not sustained by sufficient evidence and is contrary to law." The record shows that the consideration of the note which was executed by Hargis in person was for the same money loaned to Hargis in person and declared for in the second paragraph of the complaint. On January 3, 1880, appellant, the owner of a farm, entered into a written agreement with James H. Hargis for its cultivation; that under the contract he (James H. Hargis) resided

upon and cultivated the farm until 1890, when his son J. L. Hargis, who for some time had acted as his father's foreman, moved on the farm, his father moving off, and during the son's occupancy and cultivation of the farm the alleged indebtedness accrued. The record shows that there was no contract for the occupancy or cultivation of the farm, written or oral, between appellant and James H. Hargis or J. L. Hargis, other than the written agreement with James H. Hargis. There is evidence that J. L. Hargis succeeded to the position and rights of his father, J. H. Hargis. The second paragraph alleges a partnership between J. H. Hargis and the appellant. Counsel for appellee state in their brief that the court found that they were partners, and that the money was used in the discharge of indebtedness created for the benefit of the partnership. Appellee contends that the contract made the parties thereto a farm partnership. Appellant contends that it is a contract "to rent and farm let," as declared therein and does not create a partnership of any kind. Counsel for appellee, in support of their views, argue that Bradley furnished the farm and two-thirds of the personal property; that one-third of the personal property was appraised, and charged to Hargis, who, by the terms of the contract, became the owner of one-third the personal property, for the purchase of which he became indebted to Bradley, and agreed to pay interest thereon; that he furnished his own and hired labor; that he had the power of general manager; that there was to be a showing of the losses and profits, "two-thirds of the net profits to go to the party of the first part, and one-third thereof to go to the party of the second part, and the losses and expenses to be applied, two-thirds to the party of the first part, and one-third to the party of the second part." It is claimed for counsel for appellee that these terms and stipulations of the agreement made the contract one of partnership; citing 17 Am. & Eng. Enc. Law, p. 854; Brown v. Higginbotham, 5 Leigh (Va.) 583, 27 Am. Dec. 618; Champion v. Bostwick, 18 Wend. (N. Y.) 183, 31 Am. Dec. 376; Pettee v. Appleton, 114 Mass. 114; Fougner v. Bank, 141 Ill. 124, 30 N. E. 442; State Nat. Bank v. Butler, 149 Ill. 575, 36 N. E. 1000. As appears from brief of appellee, the cause was tried and decided upon the theory that appellee and appellant were partners.

In the construction of a contract, we look to the intention of the parties. As said in George, Partn. p. 31: "But it is the legal, rather than the declared, intention that controls. If the parties intend and do those things which the law declares constitute a partnership, then the parties are partners, and an express stipulation that they do not intend to form a partnership is of no avail. It simply shows that they have mistaken the legal effect of the agreement which they intended to make." The fact of partnership, in the case before us, depends entirely upon the written agreement. * * * From an examination of its terms, we think it quite clear that the parties did not intend to form a partnership. The words which are usually employed

in articles embracing the formation of a partnership are wholly wanting. The intention to form a partnership is nowhere in terms expressed. Upon the contrary, the agreement recites that "the party of the first part has this day rented and farm let unto the party of the second part his [Bradley's] said farm, * * * for the term of one year, and after the 1st day of March, 1880, with the privilege of continuing the same from year to year on the terms hereinafter enumerated,' * * * and at the expiration of each year during the term of such tenancy," etc., "they shall meet on proper notice, * * * adjust their business and claims pertaining to said renting." Did the parties, without intending so to do, enter into a partnership? Collyer on Partnership (chapter 1) thus defines a "partnership": "If there is a joint undertaking and community of profit and loss, each party sharing in these mutually, and having a specified interest in the profits, not as compensation for services rendered, but as an associate in the undertaking, the relation of partner is formed." George on Partnership, at page 50, says: "Cox v. Hickman, 8 H. L. Cas. 268, established the proposition that partners are the agents of each other; but, for reasons just explained, mutual agency is not the test of partnership. The ultimate and conclusive test of a partnership is the ownership of the profits of the business. If there is a community of profits, a partnership follows. Community of profits means a proprietorship in them, as distinguished from a personal claim upon the other associate; in other words, a property right in them from the start in one associate as much as in the other." The contract provides for the purchase by the party of the second part of a one-third interest in the personal property on the farm. The remaining two-thirds interest was reserved in the party of the first part. This created a tenancy in common. It provides for the sale of the farm property on hand when the contract was entered into by "the mutual consent and agreement of the parties." The parties were not made the mutual agents of each other, each as principal. In Roper v. Schaefer, 35 Mo. App. 30, in which numerous authorities are cited, the rule stated in an instruction as follows was approved: "The court declares the law to be that a simple partnership in profits and losses of a business does not constitute a partnership, but there must be such community of interests as enables each party to make contracts, manage the whole business, dispose of the whole property; and the rule is the same as to third persons, unless the party sought to be charged has so acted as to lead the plaintiff to believe a partnership existed and to act upon such belief." The contract in question provides that the party of the second part will cultivate all the farming land thereon, in such crops and in such proportion as the parties may agree upon from year to year; that he will plow and gather in good season or order, circumstances permitting, and put in a crib or garner; and the parties are to sell the product of said farm at such prices as said parties may agree upon from time to time; "the said party of the second part

to have charge of said farm, and to take full power to make all necessary purchases for said farm, and to buy and sell such stock, and for such price, as may be mutally agreed upon." "The party of the second part to keep a complete and correct account of all purchases and sales of any kind and character pertaining to the management of said farm under this contract, which shall be open to the inspection of both parties." These provisions are consistent with the theory of tenancy, and with the foremanship of the party of the second part, and inconsistent with the theory of partnership, because the right of a partner to inspect the books is an incident of partnership, not dependent upon contract. The party of the first part is to have two-thirds of the price of all articles sold from said farm, and the party of the second part, one-third thereof. The agreement stipulates that the party of the second part shall not be required to replace buildings destroyed by fire. This provision would seem wholly out of place in a partnership agreement, but the parties may reasonably have had in mind the rule that ordinarily leased premises are to be surrendered to the landlord in as good repair as when taken, process of ordinary decay excepted.

We are unable to agree with the learned trial court in the conclusion reached. We are of the opinion that the intention of the parties, gathered from the instrument, was to not enter into a partnership, and that without reference to their intention, as gathered from the extracts we have made from the contract descriptive of the relation intended to be created, the instrument cannot be construed as creating a partnership. The specific interest in the profits given to the tenant were in compensation for services rendered. It contains no provision inconsistent with this interpretation, while the theory of partnership is against the apparent intention of the parties. * * *

Judgment reversed, with instructions to sustain appellant's motion for a new trial.

DURYEA et al. v. WHITCOMB.

(Supreme Court of Vermont, 1858. 31 Vt. 395.)

Book account. The auditor reported that on the 20th of August, 1854, the defendant, the plaintiffs, and Isaac B. Lewis made an agreement in the city of New York, where both the plaintiffs and Lewis resided and were engaged in the purchase and sale of potatoes, that the defendant, who resided in Wells River, in this state, should purchase potatoes during that season in Vermont and New Hampshire, taking the advice of the plaintiffs and Lewis, from time to time, in regard to the price, amount, and market of such purchases; that the defendant was to devote his whole time to this business, and was to have 6 cents per bushel to cover the expense of buying and carrying

the potatoes, which sum of 6 cents per bushel was to be added to the cost of the potatoes; that if it should become necessary, in the course of such purchases, for the defendant to visit other parts of the country, the expense thereof should be borne, one-half by the defendant, one-quarter by Lewis, and one-quarter by the plaintiffs; that the defendant was to send the potatoes purchased by him to such market as he should think best, advising, however, on this subject, with Lewis and the plaintiffs; that all the potatoes which the defendant should purchase and send to New York were to be taken by Lewis or the plaintiffs, and sold at the highest market price by the one who should receive them, such party charging nothing for selling, and each to be accountable for their own sales; that if the defendant chose to send any of the potatoes purchased by him to any other market than New York he should be accountable for the amount of the sales thereof; that all the expenses of transportation of the potatoes to market were to be paid by the defendant, and added to the general cost of the potatoes, and at the close of the season the profit or loss on all the potatoes purchased by the defendant were to be apportioned among the parties as follows: to the defendant one-half, to the plaintiffs one-quarter, and to Lewis one-quarter; and that, if the defendant at any time needed more funds than he had for such purchases, he might draw on Lewis, or on the plaintiffs, in such a manner and to such an extent that the defendant should furnish one-half of the money for such purchases, the plaintiffs one-quarter, and Lewis one-quarter. The auditor further reported that in pursuance of this agreement potatoes were purchased by Whitcomb and sent to market and sold by the other parties, and that upon an adjustment of the claims of the plaintiffs against the defendant, arising out of such purchases and sales (which were the only matters embraced in the plaintiffs' account), including the defendant's share of a loss in said business, computed according to the terms of the agreement, he found that the defendant was indebted to the plaintiffs in the sum of $848.45. The auditor further reported that at the time the above-mentioned arrangement was made nothing was said between the parties about a partnership, and the auditor found from the foregoing facts that neither of the parties at that time supposed they were forming a partnership or intended to form one. The defendant insisted before the auditor, as well as before the county court, that this arrangement constituted a partnership between him, the plaintiffs, and Lewis, and claimed that the affairs of such partnership could not be adjusted in this action. But the county court rendered judgment upon the report for the plaintiffs for the amount reported by the auditor, to which the defendant excepted.

Aldis, J. As this is a case where the rights of the partners inter se merely are concerned, where no question as to third persons is involved, the criterion to determine whether the contract is one of partnership or not must be: What did the parties intend by the contract which they made as between themselves?

If we regard the agreement itself, as set forth in the auditor's report, it is clearly a partnership. * * *

The parties all furnish a share of the capital—Whitcomb one-half, Lewis one-quarter, the Duryeas one-quarter. They jointly own the property when purchased. It is purchased in order to be sold again for their joint and mutual benefit, thereby negating the idea of separate control and disposition of their interests in the property purchased and of separate interests in the proceeds. Each is to share in the final profit or loss. At the close of the season the profits or losses are to be divided, to Whitcomb one-half, to Lewis a quarter, to the plaintiffs a quarter. Each is to aid in selling, and to contribute his aid, skill, and knowledge to get the highest price. * * *

The fact that each was to be accountable for his own sales amounts only to this: That each should sell for cash. If either did not, he was to be accountable for his sale as cash. The proceeds of the sales by each would belong to them jointly, not severally. This provision is as consistent with an agreement for a partnership as with any other. Noyes v. Cushman, 25 Vt. 390. So that Whitcomb was to have the control of the potatoes, and to run them to the best market, taking the advice of Lewis and the Duryeas on the subject, is, when we consider where the parties resided, where the potatoes were to be bought, and to what markets they might be sent, and that Whitcomb was to buy them, as consistent with a contract of partnership as with any other.

I. This agreement does not belong to the class of cases where the parties are jointly interested in certain proportions in the property purchased, but not in the final profits or losses, where each of the part owners has the power of separate disposition of his interest. Such is the case of Coope v. Eyre, 1 H. Bl. 37, a leading illustration of the class.

II. It is not of the class where a party receives a portion of the profits as a compensation for his labor as an agent or servant. Each furnished a portion of the capital. Each was a part owner of the property when purchased, and of the proceeds when sold. Neither could be said to be the servant or agent of the other. An agent who receives a share of the profits as a compensation for his services is not expected to share in losses. If there are no profits, he loses his labor or wages; but he loses no more, though there are further losses to be borne by the partners.

Of this class is Kellogg v. Griswold, 12 Vt. 291, and Mason v. Potter, 26 Vt. 722.

III. Nor is it a case where a share of the gross or net earnings is to be paid as a compensation for the use of capital, or as rent, and where the party receiving such compensation has no interest in the business, the property, and the proceeds, but only a right of action against the other parties. Here the parties jointly contributed capital, labor, and skill—were joint owners of the property from the time of

its purchase till the final division of profits or loss. No severance of their interests could be had. No ascertainment of their respective shares or interests could be made till a final accounting. They must have relied on the property and its proceeds to secure to each his final share, no matter by whom the property might be sold, or its proceeds held.

Hence the cases of Tobias v. Blin, 21 Vt. 544, Bowman et al. v. Bailey, 10 Vt. 170, and Ambler v. Bradley, 6 Vt. 119, do not apply. Of the same class are Denny v. Cabot, 6 Metc. (Mass.) 92, Holmes v. R. R. Corp., 5 Gray (Mass.) 58, Loomis v. Marshall, 12 Conn. 69, 30 Am. Dec. 596, and various other cases cited by counsel.

It is said, however, that the auditor finds that the parties did not intend to form a partnership, and that such intention must govern.

It is with contracts of partnership, as with all other contracts, that as between the parties to them their intention must govern. Hence an express stipulation in a contract that the parties thereto shall not thereby become partners is binding and of great significance in giving construction to the instrument, especially if the terms are doubtful, or susceptible of more than one meaning.

1. It is to be noted that in this case there was no such express stipulation. The auditor's report says: "At the time of the arrangement in New York, August 20, 1854, nothing was said about a partnership, and neither of the parties at that time supposed they were forming a partnership, or intended to form a partnership." As nothing was said about a partnership, the parties could not have stipulated that their contract should not create one.

2. The report states what was the arrangement of August 20, 1854. That was a contract for a partnership. If their contract was for a partnership by necessary legal construction (which we have found that it was), and they intended to make the contract (and this appears from the report), the legal effect of their contract could not be varied by their not supposing it to be what it was. The further statement in the report that they did not intend to form a partnership seems inconsistent with the other facts. One is at a loss to perceive how the auditor could discover such an intention, when nothing was said about a partnership, and when the contract which they made was a partnership. Probably the fair construction of the report is that the parties were not aware of the legal extent and obligation of the contract into which they entered.

As the contract imports a partnership, we must hold, in the absence of any express stipulation and of any other circumstances to show the contrary, that they intended to create the relation which the contract expresses. * * *

The result is that the judgment of the county court is reversed, and judgment rendered for the defendant to recover his costs.[1]

[1] "It was said, and said with considerable force, that they never intended to be partners. What they did not intend to do was to incur the liabilities

SECTION 3.—TESTS OF INTENTION.

I. Sharing Profits—Former Doctrine.

GRACE v. SMITH.

(Court of Common Pleas, 1775. 2 W. Bl. 998.)

De Grey, C. J., reported: That this was an action brought against Smith alone as a secret partner with one Robinson (vide Abbot and Smith), to whom the goods were delivered, and who became bankrupt in 1770. That on the 30th of March, 1767, Smith and Robinson entered into partnership for seven years, but in the November afterwards, some disputes arising, they agreed to dissolve the partnership. The articles were not canceled, but the dissolution was open and notorious, and was notified to the public on the 17th of November, 1767. The terms of the dissolution were that all the stock in trade and debts due to the partnership should be carried to the account of Robinson only; that Smith was to have back £5,200, which he brought into the trade, and £1,000 for the profits then accrued since the commencement of the partnership; that Smith was to lend Robinson £4,-000, part of this £5,200, or let it remain in his hands for seven years, at 5 per cent. interest and an annuity of £300 per annum for the same seven years—for all of which Robinson gave bond to Smith. In June, 1768, Robinson advanced to Smith £600 for two years' payment of the annuity and other sums by way of interest and gratuities, and other large sums at different times, to enable him to pay the partnership debts; Smith having agreed to receive all that was due to the partnership, and to pay its debts, but at the hazard of Robinson. That on the 1st of August, 1768, the demands of Smith were all liquidated and consolidated into one, viz., £5,200 due to him on the dissolution of the

of partners. If intending to be a partner is intending to take the profits, then they did intend to be partners. If intending to take the profits and have the business carried on for their benefit was intending to be partners, they did intend to be partners. If intending to see that the money was applied for that purpose, and for no other, and to exercise an efficient control over it, so that they might have brought an action to restrain it from being otherwise applied, etc., was intending to be partners, then they did intend to be partners." Per Jessel, M. R., in Pooley v. Driver, 5 Ch. Div. 458, 483 (1876).

"It is nevertheless possible for parties to intend no partnership, and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise, we should 'carry the doctrine of constructive partnership so far as to render it a trap to the unwary.'" Per Cooley, J., in Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.

partnership, £1,500 for the remaining five years of the annuity, and £300 for Smith's share of a ship, in all, £7,000, for which Robinson gave a bond to Smith. That on the 22d of August, 1769, an assignment was made of all Robinson's effects to secure the balance then due to Smith, which was stated to be £10,000. Soon after the commission was awarded.

Davy, for the plaintiff, insisted that the agreement between Robinson and Smith was either a secret continuance of the old partnership or a secret commencement of a new one, being for the retiring partner to leave his money in the visible partner's hands, in order to carry on his trade, and to receive for it 12½ per cent. profit, which could not fairly be done, unless it be understood to arise from the profits of the trade, and that he ought therefore to be considered as a secret partner; and he relied much on a case of Bloxham and Fourdrinier v. Pell and Brooke, tried at the same sittings (7th of March 1775), before Lord Mansfield in the King's Bench, as in point. "This was also a partnership for seven years between Brooke and Pell, but at the end of one year agreed to be dissolved, but no express dissolution was had. The agreement recited that, Brooke being desirous to have the profits of the trade to himself and Pell being desirous to relinquish his right to the trade and profits, it was agreed that Brooke should give Pell a bond for £2,485, which Pell had brought into the trade, with interest at 5 per cent., which was accordingly done. And it was further agreed that Brooke should pay to Pell £200 per annum for six years, if Brooke so long lived, as in lieu of the profits of the trade; and Brooke covenants that Pell should have free liberty to inspect his books. Brooke became a bankrupt before anything was paid to Pell. And, this action being brought for a debt incurred by Brooke in the course of trade, Lord Mansfield held that Pell was a secret partner. This was a device to make more than legal interest of money, and, if it was not a partnership, it was a crime. And it shall not lie in the defendant Pell's mouth to say: 'It is usury, and not a partnership.'"

Grose and Adair, for the defendant, argued that the present case is very distinguishable from that of Bloxham v. Pell. Pell was to be paid out of the profits of the trade, as appears from the covenant to inspect the books, which else would be useless. His annuity was expressly given as and in lieu of those profits. It was contingent in another view, as it depended on the life of Brooke, by whom those profits were to be made. In our case the annuity is certain, not casual. It does not depend on carrying on the trade, nor to cease when that is left off, but is due out of the estate of Robinson. It is not a necessary dilemma, but it must be either usury or partnership. It may be, and probably was, a premium for the good will of the trade. Two thousand guineas is no uncommon price for turning over the profits of a trade so beneficial that it appears to have been rated at £1,000 to each partner in the space of less than eight months. And

whether that sum is agreed to be paid at once, or by seven installments, it is the same thing. Besides, whether there be or be not a secret constructive partnership is a question proper for a jury, who have decided it on consideration of all the circumstances.

De Grey, C. J. The only question is, what constitutes a secret partner? Every man who has a share of the profits of a trade ought also to bear his share of the loss. And if any one takes part of the profit, he takes a part of that fund on which the creditor of the trader relies for his payment. If any one advances or lends money to a trader, it is only lent on his general personal security. It is no specific lien upon the profits of the trade, and yet the lender is generally interested in those profits. He relies on them for repayment. And there is no difference whether that money be lent de novo or left behind in trade by one of the partners, who retires. And whether the terms of that loan be kind or harsh makes also no manner of difference. I think the true criterion is to inquire whether Smith agreed to share the profits of the trade with Robinson, or whether he only relied on those profits as a fund of payment; a distinction not more nice than usually occurs in questions of trade or usury. The jury have said this is not payable out of the profits; and I think there is no foundation for granting a new trial.

Gould, Blackstone, and Nares, JJ., concurred.

Rule discharged.

WAUGH v. CARVER et al.

(Court of Common Pleas, 1793. 2 H. Bl. 235.)

Assumpsit by Waugh against Erasmus Carver, William Carver, and Archibald Giesler, as partners, for goods sold and delivered by the plaintiff to Giesler at his agency at Cowes. The Carvers denied a partnership with Giesler. Verdict for plaintiff, subject to the opinion of the court on a case stated.

The Carvers were engaged in the business of shipping agents at Gosport, and Giesler was engaged in a similar business at Plymouth. These parties entered into a written agreement in substance as follows: The said Giesler will remove from Plymouth and establish himself at Cowes for the purpose of carrying on a house there in the agency line on his own account; but, in consequence of the assistance and recommendations which the Carvers have agreed to render in support of the agency at Cowes, Giesler agrees to pay to the Carvers one-half of the commission or agency to be received on all the ships or vessels as may arrive or put into the port at Cowes, or remain in the road to the westward thereof, of which the said Giesler may procure the address, and likewise one-half of the discount on the bills of several tradesmen employed in the repairs of such ships or vessels. Giesler will also consult and advise with the Carvers respecting ships or ves-

sels, and pursue such measures as may be for the best interest of all concerned, and will facilitate the procuring by the Carvers of warehouse facilities at Cowes. And the said Carvers, for the considerations hereinbefore mentioned, agree to pay to Giesler three-fifths of the commissions to be received by them on account of certain vessels proceeding from Cowes to Portsmouth and vessels stopping at Portsmouth, and 1½ per cent. on the amount of bills of tradesmen employed in the repairs of such vessels, and certain percentage of charges received for warehouse facilities furnished by the Carvers to vessels unloading at Cowes; and also the said Carvers and Giesler will meet yearly for the purpose of examining and settling their accounts concerning the commission business, and that such party from whom the balance shall then appear to be due shall pay the same to the other party on such settlement.

And it is hereby likewise covenanted, declared, and agreed, by and between the said Erasmus Carver and William Carver and the said Archibald Giesler, that each party shall separately run the risk of and sustain all such loss and losses as may happen on the advance of moneys in respect of any ships or vessels under the immediate care of either of the said parties, respectively; it being the true intent and meaning of these presents, and of the parties hereunto, that neither of them, the said Erasmus Carver and William Carver and Archibald Giesler shall, at any time or times during the continuance of this agreement, be in any wise injured, prejudiced, or affected by any loss or losses that may happen to the other of them, or that either of them shall in any degree be answerable or accountable for the acts, deeds, or receipts of the other of them, but that each of them, the said Erasmus Carver and William Carver and Archibald Giesler, shall, in his own person and with his own goods and effects, respectively be answerable and accountable for his losses, acts, deeds, and receipts.

And it is hereby further covenanted, declared, and agreed by and between the said Erasmus Carver and William Carver and Archibald Giesler that these presents do not, nor shall be construed to, mean to extend to such ships or vessels that may come to the address of either of the said parties, respectively, for the purpose of loading or delivering any goods, wares, or merchandise; it being the true intent and meaning of these presents, and the parties hereunto, that the foregoing articles shall not, nor shall be construed to, bear reference to their particular or separate mercantile concerns or connections.

Lord Chief Justice EYRE. This case has been extremely well argued, and the discussion of it has enabled me to make up my mind, and removed the only difficulty I felt, which was whether, by construing this to be a partnership, we should not determine that if there was an annuity granted out of a banking house to the widow, for instance, of a deceased partner, it would make her liable to the debts of the house and involve her in a bankruptcy. But I think this case will not lead to that consequence.

The definition of a partnership cited from Puffendorf is good as between the parties themselves, but not with respect to the world at large. If the question were between A. and B. whether they were partners or not, it would be very well to inquire whether they had contributed, and in what proportions, stock, or labor, and on what agreements they were to divide the profits of that contribution. But in all these cases a very different question arises, in which the definition is of little service. The question is, generally, not between the parties as to what shares they shall divide, but respecting creditors claiming a satisfaction out of the funds of a particular house, who shall be deemed liable in regard to these funds. Now, a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labor nor money, and, to go still further, not to receive any profits. But, if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing. The argument gone into, however proper for the discussion of the question, is irrelevant to a great part of the case. Whether these persons were to interfere more or less with their advice and directions, and many small parts of the agreement, I lay entirely out of the case, because it is plain upon the construction of the agreement, if it be construed only between the Carvers and Giesler, that they were not, nor ever meant to be partners. They meant each house to carry on trade without risk of each other, and to be at their own loss. Though there was a certain degree of control at one house, it was without an idea that either was to be involved in the consequences of the failure of the other, and without understanding themselves responsible for any circumstances that might happen to the loss of either. That was the argeement between themselves. But the question is whether they have not, by parts of their agreement, constituted themselves partners in respect to other persons. The case, therefore, is reduced to the single point whether the Carvers did not entitle themselves, and did not mean, to take a moiety of the profits of Giesler's house, generally and indefinitely as they should arise, at certain times agreed upon for the settlement of their accounts. That they have so done is clear upon the face of the agreement; and upon the authority of Grace v. Smith he who takes a moiety of all the profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. That was the foundation of the decision in Grace v. Smith, and I think it stands upon the fair ground of reason. I cannot

agree that this was a mere agency in the sense contended for on the part of the defendants, for there was a risk of profit and loss. A ship agent employs tradesmen to furnish necessaries for the ship. He contracts with them and is liable to them. He also makes out their bills in such a way as to determine the charge of commission to the shipowners. With respect to the commission, indeed, he may be considered as a mere agent; but as to the agency itself he is as much a trader as any other man, and there is as much risk of profit and loss, to the person with whom he contracts, in the transactions with him, as with any other trader. It is true he will gain nothing but his discount; but that is a profit in the trade, and there may be losses to him, as well as to the owners. If, therefore, the principle be true that he who takes the general profits of a partnership must of necessity be made liable to the losses, in order that he may stand in a just situation with regard to the creditors of the house, then this is a case clear of all difficulty. For though with respect to each other these persons were not to be considered as partners, yet they have made themselves such, with regard to their transactions with the rest of the world. I am therefore of opinion that there ought to be judgment for the plaintiff.

GOULD and HEATH, JJ., concurred. ROOKE, J., gave no opinion.

LEGGETT et al. v. HYDE et al.

(Court of Appeals of New York, 1874. 58 N. Y. 272, 17 Am. Rep. 244.)

Appeal by defendant George M. Hyde from judgment of the General Term of the Supreme Court in the Second Judicial Department, affirming a judgment in favor of plaintiffs entered upon a verdict, and affirming order denying motion for a new trial. This action was brought against defendants, who were alleged to be members of the firm of A. D. Putnam & Co., to recover for goods sold and delivered to that firm. Defendant Hyde denied that he was a partner. At the close of the evidence the counsel for defendant Hyde asked the court to direct a verdict in his favor, which was denied. The court, upon request of plaintiffs' counsel, directed a verdict in favor of plaintiffs, to which defendant's counsel excepted. A verdict was rendered accordingly.

FOLGER, J. At the trial each party asked the court to direct a verdict in his favor. Each thereby conceded that there could be no dispute upon any question of fact. Each thereby conceded that there was left for decision only a question of law, and that it arose upon a settled and uncontradicted state of facts.

Taking the view of the testimony the most favorable for the appellant, the facts are these: In 1869 one Putnam and one Henneberger were partners in business, under the firm name of A. D. Putnam &

Co. In that year the appellant invested or deposited with that firm \$1,500. This sum was credited on its books to Fredk. Hyde, the son of the appellant. For this sum the appellant was to share in the profits of the business of the firm. His share was to be one-third, and demandable by him at the end of the year. At the end of the year his share of the profits was \$500. This sum was also placed to the credit of Fredk. Hyde. Then, in 1870, the appellant loaned to the firm for one year the original sum of \$1,500 and the \$500 of profits, thus making \$2,000. In the consideration of this loan the firm agreed to hire Fredk. Hyde as clerk, at \$10 per week, for the year; to pay the appellant one-third of the profits, which were to be settled half-yearly; and, at the end of the year, to take him in as a partner, if the firm and he should feel satisfied, on his making further investments and putting in more capital. Though it is nowhere in the testimony so stated in terms, yet it is fairly to be inferred that the \$2,000 was loaned to be used in the business, and that if at the end of the year the appellant did not become an ostensible partner he was to be repaid, out of the concern, the \$2,000, but without interest, strictly as such. The appellant never interfered in the affairs of the concern, nor exercised any control in the business. At the end of the first six months there were no profits of the business. The appellant never received anything for his \$2,000, nor anything by way of interest money.

The prominent and important facts are that he loaned the firm a sum of money to be employed as capital in its business, and that therefor he was entitled to have and demand from it one-third of the profits of its business every half year. In my judgment there results from this that Putnam and Henneberger, making use of that money as capital in that business, used it there for the benefit of the appellant, because any return to him, for the loan to them, must come from the use of it. If not used so that profits were made, he got no return. Further: That he had an interest in the profits, which, while they were anticipatory, was indefinite as to amount, but, when they were realized, was measured and specific as to share. Further: That his interest in them was in them as profits: that is, that he had a right on the lapse of every six months, though having no property in the whole capital, to have an account taken of the business, and a division made of the profits then appearing. Ex parte Hamper, 17 Vesey, 403. So it is said in Everett v. Coe, 5 Denio, 182: "If he is to be paid out of profits made, then he has a direct interest in them. And see Ogden v. Astor, 4 Sandf. 321, 322. That he had this right to an account and a division at other time than at the end of each six months, if at any other time the exigencies of the concern, as the dissolution of the firm by death of one partner, or other reason, required an account to be taken. He had that interest in the profits, as profits, because he could claim a share of them specifically, as they should appear on each six months, or other accounting of the business of the term then ended, and could then have and demand payment of his

share. By the terms of his contract with the firm, if it be upheld as made, he was interested in and affected by the results only of the year, as ascertained at the end of each six months. It would not affect him in the right to account, though the business of a previous year had been disastrous. If either six months' business should yield a profit, he could insist on payment to him of one-third thereof, and could demand that an account be had of the business of any six months to ascertain if there had been profit. It was one-third of the profits that he was to have, and not a sum in general equal to that one-third. So that he was to take it as profits, and not as an amount due; not as a measure of compensation, but as a result of the capital and industry.

The learned counsel for the appellant states the question of law to be this: Does a loan of money, with an agreement for compensation from the profits of the business, per se constitute the lender a partner quoad the creditors of the firm? Is this statement of it correct? Does the phrase "compensation from the profits" fully meet case? Does it fully present the fact that by the agreement the appellant obtains an interest in the profits as such, and a right to insist upon an accounting, and a division thereof half-yearly? With this supplement, the question for decision is as stated by him. I am not to say what I think ought to be the answer to it, was this a case of first impression. I am to declare what I ascertain to be the answer already given by the law in this state, as it has been settled and declared by the authorities. The argument of the learned counsel is very ingenious, and very forcible when considered in reference to what should be the proper rule, and what the true reasons upon which a rule should be founded. Yet, if it is found that by a long course of decisions, or by long acquiescence in and adherence to, a rule some time ago authoritatively promulgated, there has been established a principle of commercial law upon which the community has acted, it is the duty of the courts to adhere thereto, leaving it to the lawmaking power to find a remedy, if remedy be needed, in a positive alterative enactment. In England this had been done, and by an act of Parliament an important change has been made. St. 28 & 29 Vict. c. 86.

In the first place, it matters not that the defendants meant not to be partners at all, and were not partners inter sese. They may be partners as to third persons notwithstanding. Manhattan Brass Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177. And this effect may result, though they should have taken pains to stipulate among themselves that they will not, in any event, hold the relation of partners. Among the reasons given is this, whether it be strong or weak: That whatever person shares in the profits of any concern shall be liable to creditors for losses also, since he takes a part of the fund, which in great measure is the creditors' security for the payment of the debts to them. Waugh v. Carver, 2 H. Bl. 235, citing Grace v. Smith, 2

W. Bl. 998. The doctrine took its rise in the decision in these cases. And commenting upon them, the text-writers, who have presented most forcible criticisms upon it, say: "The principle laid down by De Grey, C. J., in Grace v. Smith, has served as the foundation of a long line of decisions which cannot now be overruled by any authority short of that of the Legislature. * * * And in all cases in which there is no incorporation, nor limited liability, it must still be regarded as binding on the courts." Lindley on Part. *36. "The doctrine is completely established upon the very ground asserted in Grace v. Smith." Story on Part. § 36, note 3. And so Mr. Parsons, in his book on Partnership, quoting Lord Eldon, Ex parte Hamper: "But if he has a specific interest in the profits themselves, as profits, he is a partner"—adds: "Undoubtedly he is. Every principle of the law of partnership leads to this conclusion." He contends, however, that the specific interest in profits which is to make a person a partner must be a proprietary interest in them, existing before the division of them into shares. See, also, 3 Kent's Commentaries, *25, note "b," where it is said: "The test of partnership is a community of profit; a specific interest in the profits, as profits, in contradistinction to a stipulated portion of the profits as a compensation for services." The courts of this state have always adhered to this doctrine and applied or recognized it in the cases coming before them. * * *

It is not too much to say, that the limited partnership act, 1 Rev. St. (1st Ed.) p. 764, pt. 2, c. 4, tit. 1, is a legislative and practical recognition of this rule of commercial law. Indeed, if it shall be held that such a contract as that of the appellant does not make him a partner as to third persons, there is little or no need of that act. The situation of the special partner is more onerous than that of the appellant under such a ruling. The first may lose his capital invested, as well as profits, by the same being absorbed in the payment to creditors. The latter may lose his anticipated compensation for his money loaned; but his position is quite as favorable to him as that occupied by creditors for the recovery of his money advanced. Neither may interfere, to transact business, or to sign for the firm, or to bind the same. Both may advise as to the management. Both may examine into the state and progress of the partnership concerns—the special partner, from time to time; the appellant, at the end of every six months. In one respect the special partner is better placed. He may stipulate for legal interest on his capital invested, as well as for a portion of the profits. The appellant, if he bargained for profits in addition to interest, might be in conflict with the usury act. It is evident that most of the conveniences and advantages of the limited partnership act, and some which it does not give, might be obtained by a loan of money, with a stipulation for compensation for its use by a share of the profits, if thereby a partnership is not created as to third persons. This is not decisive as to what the law is; but

it is strongly indicative of the view of the law held by the revisers and by the Legislature.

There have been from time to time certain exceptions established to this rule in a broad statement of it; but the decisions by which these exceptions have been set up still recognize the rule that, where one is interested in profits as such, he is a partner as to third persons. These exceptions deal with the case of an agent, servant, factor, broker, or employé, who, with no interest in the capital or business, is to be remunerated for his services by a compensation from the profits, or by a compensation measured by the profits; or with that of seamen, on whaling or other like voyages, whose reimbursement for their time and labor is to finally depend upon the result of the whole voyage. There are other exceptions, like tenants of land, or a ferry, or an inn, who are to share with the owners in results, as a means of compensation for their labor and services. The decisions which establish these exceptions do not profess to abrogate the rule—only to limit it.

It is claimed by the learned counsel for the appellant that the rule as announced in Grace v. Smith and Waugh v. Carver has been exploded, and another rule propounded which shields the appellant. He is correct so far as the courts in England are concerned. Cox v. Hickman, 8 H. of L. C. 268, 9 C. B. N. S. (99 E. C. L.) 47, and Bullen v. Sharp, L. R. 1 Com. Pl. 86, affirm that while a participation in the profits is cogent evidence that the trade in which the profits were made was carried on in part for or in behalf of the person claiming the right to participate, yet that the true ground of liability is that it has been carried on by persons acting in his behalf. Those cases were very peculiar in their circumstances. After the judgments rendered in them, the Parliament deemed it needful to enact that the advance of money by way of loan to a person in trade for a share of the profits should not, of itself, make the lender responsible as a partner. St. 28 & 29 Vict. c. 86, as cited in Parsons on Partn. *92, note "t." If the decisions in the cases cited went as far as is claimed, it would seem that the act was supererogatory. It is suggested, however, by Kelly, C. B., in Holme v. Hammond, L. R. 7 Exch. 218, that the effect of the statute is that the sharing in the profits by a lender shall be no evidence at all of a partnership. At all events, those decisions have been accepted in England as settling the rule as above stated. See case last cited and cases therein referred to.

Without discussing those decisions and determining just how far they reach, it is sufficient to say that they are not controlling here, that the rule remains in this state as it has long been, and that we should be governed by it until here, as in England, the Legislature shall see fit to abrogate it.

The references upon the appellant's points do not show that the courts of this state have yet exploded the rule I have stated. I have

consulted all the authorities cited (save a few of which I had not the books, or as to which there was a miscitation), and I do not find that the rule is questioned, further than to apply to the facts of the particular case some one or more of the exceptions to the rule which I have stated to exist.

I am of the opinion that the judgment appealed from should be affirmed, with costs.[1]

CHURCH, C. J., dissents.

HACKETT et al. v. STANLEY.

(Court of Appeals of New York, 1889. 115 N. Y. 625, 22 N. E. 745.)

Action by Martin Hackett and others against James Stanley, impleaded, and Moulton W. Gorham, as alleged copartners, for materials and labor furnished for the firm business. James Stanley appeals from a judgment for plaintiff.

RUGER, C. J. The determination of this case involves the construction of an agreement between James Stanley and Moulton W. Gorham, and the question whether such agreement constituted the defendant Stanley a partner as to third persons with Gorham. If it did, then the judgment must be sustained. The liability of the alleged partners is predicated upon a debt for services rendered and materials furnished by the plaintiffs, upon the request of Gorham, in fitting up a place in New York to carry on the business of heating, ventilating, etc. The part of the agreement which it is claimed creates the partnership reads as follows: "That for and in consideration of the loan of seven hundred and fifty ($750) dollars from the said party of the second part to the said party of the first part, for use in the business of heating, ventilating, etc., for which said party of the first part has given unto said party of the second part his note at two years, with interest, bearing date of January 14, 1885, payment of which is secured by an assignment of said value in a certain $3,000 policy in the Massachusetts Mutual Life Ins. Co., and also by a certain chattel mortgage, bearing date January 23, 1885, and in further consideration of services of said party of second part in securing sales in said business, and for any further moneys he may, at his own option, advance for me in said business, the said party of the first part agrees to divide equally the yearly net profits of said business. It is understood and agreed that said loan of $750 is expressly for use in said business, and for no other use whatever." It

[1] "The cases have gone further to this nicety, upon a distinction so thin, that I cannot state it as established upon due consideration: That if a trader agrees to pay another person, for his labor in the concern, a sum of money, even in proportion to the profits, equal to a certain share, that will not make him a partner; but, if he has a specified interest in the profits themselves, as profits, he is a partner." Per Eldon, L. C., in Ex parte Hamper, 17 Ves. 403 (1810).

was further provided that advances made by either party in the business were at all times subject to be withdrawn, at the option of the party making them, and were to bear interest while used in the business. Gorham was to be allowed $1,000 per annum for his services in managing the business, and quarterly statements of its condition were to be made by him to Stanley.

It is fairly to be implied from the contract that Gorham was to be the active man in the business, and it was to be carried on in his name; but whether he was to furnish any capital, and if so how much, is not disclosed. For aught that appears the money furnished by Stanley was all that was supposed to be necessary to start and carry on the business until returns were realized from its prosecution.

This agreement does not, in express terms, purport to form a partnership; neither is the intention to do so disclaimed; and the question is therefore whether, in a business carried on under the conditions provided for in the contract, the parties thereto became partners, as to third persons. It clearly provides for something more than a loan of money, as it is fairly to be implied from it that Stanley would render active services as a principal in the prosecution of the business, and furnish further financial aid therefor, if it became necessary, and he deemed it advisable to do so. The loan was not one made to Gorham generally, but was for the benefit of the particular business, in whose prosecution Stanley had an equal interest, and any diversion of the funds from such use was strictly prohibited. Each party was authorized to charge the business with interest on the funds advanced by him for its prosecution, and they would each be entitled to pro rata reimbursement of such funds from the assets of the business, in case of a deficiency in assets to pay the advances in full. In that respect, it was evidently contemplated that each party should bear any loss incurred, in proportion to the advances made by them respectively. For all this, Stanley was to receive one-half the net profits of the business. His right to profits would not cease upon the repayment of the original loan, or depend upon the value of the services rendered or moneys advanced or either of them alone, but was to continue as long as the business was carried on. The letter of the contract is that in consideration of the loan of $750, payable in two years, and the further consideration of services in securing sales in said business, and further moneys furnished, the net profits are to be divided. The services promised, and the moneys advanced and to be advanced, each and all constituted the consideration for the division of the profits. We think such an agreement, within all authorities, constitutes a partnership as to third parties. By it, Stanley had an interest in the general business of the concern; a right to require a quarterly account of its transactions; authority to make contracts in its behalf; and an irrevocable right to demand one-half of the profits of the business. That the original loan of $750 was secured to be repaid by Gorham to Stanley does not preclude the conclusion that they were partners; for it is entirely

competent for one partner to guaranty another against loss, in whole or in part, in a partnership business, if the parties so agree. The application of the rule that "participation in profits" renders their recipient a partner in the business from which profits are derived, as to third persons, has been somewhat restricted by modern decisions; but we think that the division of profits must still be considered the most important element in all contracts by which the true relation of parties to a business is to be determined. We think this rule is founded in strict justice and sound policy. There can be no injustice in imposing upon those who contract to receive the fruits of an adventure a liability for credits contracted in its aid, and which are essential to its successful conduct and prosecution. This liability does not, and ought not to, depend upon the intention of the parties, in making their contract, to shield themselves from liability, but upon the ground that it is against public policy to permit persons to prosecute an enterprise which, however successful it may for a time appear to be, is sure in the end to result in the advantage of its secret promoters alone, and the ruin and disaster of its creditors and others connected with it. Atherton v. Tilton, 44 N. H. 452; Chase v. Barrett, 4 Paige, 159. Expected profits being the motive which induces the prosecution of all commercial and business enterprises, their accumulation and retention in business are essential to their success; and if persons are permitted, by secret agreement, to appropriate them to their own use, and throw the liabilities incurred in producing them upon those who receive only a portion of the benefits, not only is a door opened to the perpetration of frauds, but such frauds are rendered inevitable. * * *

The rule laid down in Kent's Commentaries (volume 3, p. 25, note "b"), that "the test of partnership is a community of profit; a specific interest in the profits, as profits, in contradistinction to a stipulated portion of the profits as a compensation for services," was approved by this court in Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 244, in which case Judge Folger says: "The courts of this state have always adhered to this doctrine, and applied or recognized it in the cases coming before them." After citing numerous cases in support of the statement, he proceeds: "There have been from time to time certain exceptions established to this rule, in a board statement of it; but the decisions by which these exceptions have been set up still recognize the rule that where one is interested in profits, as such, he is a partner as to third persons. These exceptions deal with the case of an agent, servant, factor, broker, or employé who, with no interest in the capital or business, is to be remunerated for his services by a compensation from the profits, or by a compensation measured by the profits." The learned judge, after referring to the English cases claimed to have qualified, if not overruled, the cases of Grace v. Smith, 2 W. Bl. 998, and Waugh v. Carver, 2 H. Bl. 235, which were the foundation of the doctrine that a participation in profits

renders those receiving them partners, says that "without discussing those decisions, and determining just how far they reach, it is sufficient to say that they are not controlling here, that the rule remains in this state as it has long been, and that we should be governed by it until here, as in England, the Legislature shall see fit to abrogate it." * * * The doctrine that persons may be partners as to third persons, although not so as between themselves, and although the contract of partnership contains express provisions repudiating such a relation, has been too firmly established in this state by repeated decisions to be now disregarded by its courts. See cases cited in Leggett v. Hyde. It is claimed that this doctrine has been practically overruled in this state by the decisions in this court of Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267, Burnett v. Snyder, 76 N. Y. 344, Eager v. Crawford, Id. 97, Curry v. Fowler, 87 N. Y. 33, 41 Am. Rep. 343, and Cassidy v. Hall, 97 N. Y. 159. We do not think these cases had the effect claimed. They were all cases distinguished by peculiar circumstances, taking them out of the operation of the general rule. It cannot be disputed but that a loan may be made to a partnership firm on conditions by which the lenders may secure a limited or qualified interest in certain profits of the firm, without making them partners in its general business; but that is not this case.

[After reviewing the foregoing cases, the opinion continues:] It cannot reasonably be claimed that either of these cases is an authority for the reversal of this judgment. Whatever might have been their bearing if they related to the loan of money alone, we will not say; but, when connected with the circumstance that the defendant was expected to render future services as a principal, and furnish further financial aid, with a certain supervision over the conduct of the business, we think this case is clearly distinguishable from those cited.

In the view taken of this case, it is quite immaterial whether the plaintiff extended the credit to Gorham alone or not, as the defendant was held liable upon the ground that, as to third persons, he was a partner; and it did not affect that liability, whether the plaintiff knew the fact or not.

The exception to the ruling of the court sustaining the objection to the question put to plaintiff on cross-examination, as to whom the credit was furnished, was not well taken, as the fact sought to be proved was immaterial. The judgment should therefore be affirmed.

II. Development of the Modern Doctrine.

COX AND WHEATCROFT v. HICKMAN.

(House of Lords, 1860. 8 H. L. Cas. 268.)

B. and J. T. Smith, as partners under the name of B. Smith & Son, were engaged in business as iron masters and corn merchants. Becoming financially embarrassed, a meeting of creditors was held and a deed of assignment executed by the Smiths, as parties of the first part, certain of the creditors, as trustees, of the second part, and the general scheduled creditors, among whom were the trustees, of the third part. The deed assigned the property of the partnership to trustees, and empowered them to carry on the business under the name of the Stanton Iron Company; to execute all contracts and instruments necessary to carry it on; to divide the net income derived among the creditors ratably (such income to be deemed the property of the assignors), with the power to the majority of the creditors, assembled at a meeting; to make rules for conducting the business, or to put an end to it altogether; and, after the debts had been discharged, the property was to be reconveyed to the Smiths. Cox and Wheatcroft were named among the trustees. Cox never acted. Wheatcroft, after acting for six months, resigned. Afterwards the other trustees, who continued the business, became indebted to Hickman for goods supplied to the company, and gave him bills of exchange, accepted by themselves: "Per proc. The Stanton Iron Company." This was an action on the bills of exchange thus given.

The cause was tried in 1856, before the late Lord Chief Justice Jervis, when a verdict was found for the defendants; but on motion on leave reserved the verdict was entered for the plaintiff. 18 C. B. 617. The case was taken to the Exchequer Chamber, when three judges (Justices Coleridge, Erle, and Crompton) were for affirming the judgment of the Common Pleas, and three other judges (Barons Martin, Bramwell, and Watson) were for reversing it. 3 C. B. (N. S.) 523. The judgment, therefore, stood, and was afterwards brought up to this House.

The judges were summoned, and Lord Chief Baron Pollock, Mr. Justice Wightman, Mr. Justice Williams, Mr. Justice Crompton, Mr. Baron Channell, and Mr. Justice Blackburn, attended.[1]

Lord Cranworth. In this case the judges in the Court of Exchequer Chamber were equally divided, and unfortunately the same difference of opinion has existed among the learned judges who attended this House during the argument at your Lordships' bar. Except, therefore, from an examination of the grounds on which their opinions are founded, we can derive no benefit in this case from their as-

[1] The opinions of the judges summoned are omitted.

sistance. We cannot say that in the opinions delivered in this House there is more authority in favor of one view of the case than of the other. We must not, however, infer that your Lordships have not derived material aid from the opinions expressed by the judges. These opinions have stated the arguments on the one side and the other with great clearness and force, and what we have to do now is to decide between them.

In the first place let me say that I concur with those of the learned judges who are of opinion that no solid distinction exists between the liability of either defendant in an action on the bills and in an action for goods sold and delivered. If he would have been liable in an action for goods sold and delivered, it must be because those who were in fact carrying on the business of the Stanton Iron Company were carrying it on as his partners or agents; and, as the bills were accepted, according to the usual course of business, for ore supplied by the plaintiff, I cannot doubt that, if the trade was carried on by those who managed it as partners or agents of the defendant, he must be just as liable on the bills as he would have been in an action for the price of the goods supplied. His partners or agents would have the same authority to accept bills in the ordinary course of trade as to purchase goods on credit.

The liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent. Where two or more persons are engaged as partners in an ordinary trade, each of them has an implied authority from the others to bind all by contracts entered into according to the usual course of business in that trade. Every partner in trade is, for the ordinary purposes of the trade, the agent of his copartners, and all are therefore liable for the ordinary trade contracts of the others. Partners may stipulate among themselves that some one of them only shall enter into particular contracts, or into any contracts, or that as to certain of their contracts none shall be liable except those by whom they are actually made; but with such private arrangements third persons, dealing with the firm without notice, have no concern. The public have a right to assume that every partner has authority from his copartner to bind the whole firm in contracts made according to the ordinary usages of trade.

This principle applies, not only to persons acting openly and avowedly as partners, but to others who, though not so acting, are by secret or private agreement partners with those who appear ostensibly to the world as the persons carrying on the business.

In the case now before the House, the Court of Common Pleas decided in favor of the respondent that the appellant, by his execution of the deed of arrangement, became, together with the other creditors who executed it, a partner with those who conducted the business of the Stanton Iron Company. The judges in the Court of Exchequer Chamber were equally divided, so that the judgment of the Court of

Common Pleas was affirmed. The sole question for adjudication by your Lordships is whether this judgment thus affirmed was right.

I do not propose to consider in detail all the provisions of the deed. I think it sufficient to state them generally. In the first place there is an assignment by Messrs. Smith to certain trustees of the mines and all the engines and machinery used for working them, together with all the stock in trade, and in fact all their property, upon trust to carry on the business and, after paying its expenses, to divide the net income ratably amongst the creditors of Messrs. Smith, as often as there shall be funds in hand sufficient to pay one shilling in the pound, and, after all the creditors are satisfied, then in trust for Messrs. Smith.

Up to this point the creditors, though they executed the deed, are merely passive; and the first question is, what would have been the consequence to them of their executing the deed if the trusts had ended there? Would they have become partners in the concern carried on by the trustees merely because they passively assented to its being carried on upon the terms that the net income—i. e., the net profits—should be applied in discharge of their demands? I think not. It was argued that, as they would be interested in the profits, therefore they would be partners. But this is a fallacy. It is often said that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner is whether he is entitled to participate in the profits. This, no doubt, is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on on his behalf; i. e., that he stood in the relation of principal towards the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made.

Taking this to be the ground of liability as a partner, it seems to me to follow that the mere concurrence of creditors in an arrangement under which they permit their debtor, or trustees for their debtor, to continue his trade, applying the profits in discharge of their demands, does not make them partners with their debtors or the trustees. The debtor is still the person solely interested in the profits, save only that he has mortgaged them to his creditors. He receives the benefit of the profits as they accrue, though he has precluded himself from

applying them to any other purpose than the discharge of his debts. The trade is not carried on by or on account of the creditors, though their consent is necessary in such a case, for without it all the property might be seized by them in execution. But the trade still remains the trade of the debtor or his trustees. The debtor or the trustees are the persons by or on behalf of whom it is carried on.

I have hitherto considered the case as it would have stood if the creditors had been merely passively assenting parties to the carrying on of the trade, on the terms that the profits should be applied in liquidation of their demands. But I am aware that in this deed special powers are given to the creditors, which, it was said, showed that they had become partners, even if that had not been the consequence of their concurrence in the previous trust. The powers may be described briefly as, first, a power of determining by a majority in value of their body that the trade should be discontinued, or, if not discontinued, then, secondly, a power of making rules and orders as to its conduct and management.

Those powers do not appear to me to alter the case. The creditors might, by process of law, have obtained possession of the whole property. By the earlier provisions of the deed they consented to abandon that right, and to allow the trade to be carried on by the trustees. The effect of these powers is only to qualify their consent. They stipulate for a right to withdraw it altogether, or, if not, then to impose terms as to the mode in which the trusts to which they had agreed should be executed. I do not think that this alters the legal condition of the creditors. The trade did not become a trade carried on for them as principals, because they might have insisted on taking possession of the stock, and so compelling the abandonment of the trade, or because they might have prescribed terms on which alone it should be continued. Any trustee might have refused to act if he considered the terms prescribed by the auditors to be objectionable. Suppose the deed had stipulated, not that the creditors might order the discontinuance of the trade, or impose terms as to its management, but that some third person might do so, if, on inspecting the accounts, he should deem it advisable. It could not be contended that this would make the creditors partners, if they were not so already; and I can see no difference between stipulating for such a power to be reserved to a third person and reserving it to themselves.

I have, on these grounds, come to the conclusion that the creditors did not, by executing this deed, make themselves partners in the Stanton Iron Company, and I must add that a contrary decision would be much to be deprecated. Deeds of arrangement, like that now before us, are, I believe, of frequent occurrence; and it is impossible to imagine that creditors who execute them have any notion that by so doing they are making themselves liable as partners. This would be no reason for holding them not to be liable, if, on strict principles of mercantile law, they are so; but the very fact that such deeds are

so common, and that no such liability is supposed to attach to them affords some argument in favour of the appellant. The deed now before us was executed by above a hundred joint creditors; and a mere glance at their names is sufficient to show that there was no intention on their part of doing anything which should involve them in the obligations of a partnership. I do not rely on this; but, at least, it shows the general opinion of the mercantile world on the subject. I may remark that one of the creditors, I see, is the Midland Railway Company, which is a creditor for a sum only of £30, and to suppose that the directors could imagine that they were making themselves partners is absurd.

The authorities cited in argument did not throw much light upon the subject. I can find no case in which a person has been made liable as a dormant or sleeping partner, where the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents. This was certainly the case in Waugh v. Carver, 2 H. Bl. 235. There Messrs. Carver, who were ship agents at Portsmouth, agreed with Giesler, a ship agent at Plymouth, that if he would establish himself as a ship agent at Cowes they would share between them the profits of their respective agencies in certain stipulated proportions. When, therefore, Giesler, in pursuance of the agreement, did establish himself at Cowes, and there carry on the business of a ship agent, he in fact carried it on for the benefit of Messrs. Carver as well as of himself; and the court held that, in these circumstances, the stipulation which they had entered into that neither party to the agreement should be answerable for the acts of the other was a stipulation which they could not make so as thereby to affect third persons. Each firm was carrying on business on account, not only of itself, but also of the other firm. This, therefore, made each firm the agent of the other.

The case of Bond v. Pittard, 3 M. & W. 357, could admit of no doubt. The question was whether G. H. Watts and P. H. Watts could sue jointly for business transacted by them as attorneys. They had agreed to become partners on a stipulation that P. H. Watts should always receive £300 yearly out of the first profits as his share, and should not be liable for any losses. It was argued that this latter stipulation prevented them from being partners; but the court held the contrary. Each of them worked for the common benefit of both, and each of them, therefore, acted as agent of the other. The produce of the labor of each was to be brought into a common fund, to be afterwards shared according to certain arrangements between themselves. The case was really free from doubt.

A similar principle explains and justifies the decision of the Court of Common Pleas in Barry v. Nesham, 3 C. B. 641. The question was whether the defendant was liable for goods furnished to one Lowthin in the way of his business as the printer and publisher of a news-

paper. Nesham had sold the stock and good will of the paper to Lowthin, in consideration of £1,500, and on a farther stipulation that for seven years the profits were to be applied as follows; that is to say: Lowthin was to have the first £150 of the annual profits, then Nesham was to have them to the extent of £500, if they made so much, and Lowthin was to have all beyond. It is clear that Lowthin was conducting the business for the common benefit of both, subject to their private arrangements as to the shares they should separately be entitled to. Lowthin was, therefore, clearly the agent of Nesham.

Owen v. Body is at most a case in which a dictum may be found. The Court of Queen's Bench was quite right in holding that the creditors were justified in refusing to execute the deed tendered to them; and that is all which was decided.

None of the other cases cited carried the doctrine farther than those I have referred to, and I therefore think that in this case the judgment appealed against ought to be reversed.[2]

BULLEN et al. v. SHARP.

(Exchequer Chamber, 1865. Law Rep. 1 C. P. 86.)

BLACKBURN, J. This was an action on a policy of insurance against the defendant as underwriter. The policy was actually underwritten in the name of the defendant's son. The question in the cause is whether the defendant was a partner in the underwriting business carried on in his son's name, so as to make him liable to third persons on contracts made in the course of that business. On the trial, a verdict was taken by consent for the plaintiff, subject to a special case, as part of which it was agreed that the court might draw any reasonable inferences of fact. The court below have determined the question in favor of the plaintiffs. * * *

I have come to the conclusion that the judgment below ought to be reversed, as I think the defendant is not shown to have been a partner in the business carried on in his son's name.

The case of Cox v. Hickman, 8 H. L. C. 268, being a decision of the House of Lords, the ultimate court of appeal, overrules all earlier authorities inconsistent with that decision, and, so far as the judgment goes, fixed the law in this country. We are not bound by all that is said in the course of a judgment of the House of Lords; but that which appears to be the rule established by the decision of that tribunal is binding, not only on all inferior tribunals in this country, but even on that House itself when sitting judicially.

The first point, therefore, to be determined in the present case, is what really was the effect of the decision of the House of Lords in

[2] The concurring opinions of Campbell, L. C., and Wensleydale, L., are omitted. Brougham and Chelmsford, LL., concurred.

Cox v. Hickman, 8 H. L. C. 268. Prior to that decision, the dictum of De Grey, C. J., in Grace v. Smith, 2 W. Bl. 998, "that every man who has a share of the profits of a trade ought also to bear a share of the loss," had been adopted as the ground of judgment in Waugh v. Carver, 2 H. Bl. 235, where it was laid down "that he who takes a moiety of all profits indefinitely shall, by operation of law, be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts." This decision had never been overruled. The reasoning on which it proceeds seems to have been generally acquiesced in at the time; and when, more recently, it was disputed, it was a common opinion (in which I for one participated) that the doctrine had become so inveterately part of the law of England that it would require legislation to reverse it. * * * The rule laid down in Waugh v. Carver, if logically followed out, led to the conclusion that all the creditors who assented to this deed, and by so doing agreed to take the profits, were individually liable as partners; but, when it was sought to apply the rule to such an extreme case, it was questioned whether the rule itself was really established. There was a very great difference amongst the judges who decided the case in its various stages below, and also amongst those consulted in the House of Lords. In the result, the House of Lords—consisting of Lord Campbell, C., and Lords Brougham, Cranworth, Wensleydale, and Chelmsford—unanimously decided that the creditors were not partners. The judgments of Lord Cranworth and of Lord Wensleydale bear internal evidence of having been written. Lord Campbell, C., and Lords Brougham and Chelmsford, said a few words expressing their concurrence. It is therefore in the written judgments, and more especially in the elaborate judgment of Lord Cranworth, that we must look for the ratio decidendi. [The judge here read from the opinions of Cranworth and Wensleydale, LL., in Cox v. Hickman.]

I think that the ratio decidendi is that the proposition laid down in Waugh v. Carver, 2 H. Bl. 235, viz., that a participation in the profits of a business does of itself, by operation of law, constitute a partnership, is not a correct statement of the law of England, but that the true question is, as stated by Lord Cranworth, whether the trade is carried on on behalf of the person sought to be charged as a partner; the participation in the profits being a most important element in determining that question, but not being in itself decisive, and the test being, in the language of Lord Wensleydale, whether it is such a participation of profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business.

I do not think it is proper for us to inquire whether this rule of law is more or less expedient than the rule laid down in Waugh v. Carver. That is a question for the Legislature, who may alter the

law as to them seems right. We have only to administer it, and to proceed to apply what we consider to be the judgment of the House of Lords to the facts in the present case.

The case contains a power to draw inference of fact, and therefore it is open to the plaintiffs to contend that we should draw the inference that the transactions stated in the case were not really what they appear to be. I shall afterwards deal with the question how far I think such inferences ought to be drawn. At present I shall consider the case on the supposition that the various transactions between the parties really were what they purport to be.

It appears, then, that in March, 1857, the son of the defendant entered into a written agreement with one Fenn, an underwriter, which is set out in the fourth paragraph of the case. By this agreement the son was to be an underwriter; but the management of the business was to the confided to Fenn, who, in consideration of a salary of £300 a year, was to act for the son. On the same day on which this agreement was made, the defendant authorized Fenn to state to the committee of Lloyd's that he, the defendant, had placed at Fenn's disposal £5,000 and intended to give his son further aid, if needed. In November, 1858, it was resolved to extend the business carried on by Fenn in the name of the son, and by an agreement between them Fenn's salary was raised to £350. On the 1st of January, 1859, the son signed a letter, addressed to the defendant, which is set out in paragraph 11 of the case. By it, in consideration of the defendant's guaranteeing the son to the extent of £5,000 in his business of an underwriter until by such business he should acquire the clear sum of £5,000, the son promised to pay the defendant during their joint lives an annuity of £500 a year, to be increased in case one-fourth of the son's average annual net profits during the first three years should exceed £500, to a sum equal to one-fourth of such net average annual profits. This arrangement, as worded, would not increase the annuity unless the son's average net profits during the first three years should exceed £2,000 a year; so that it would seem the parties contemplated carrying on a business much more extensive than was justified by a capital of £5,000, and it is not very surprising to find that, before the three years' end, the son was a bankrupt. It was expressly stipulated in the letter that the defendant should not be a partner with his son in his business. This last stipulation is binding between them, but does not affect third parties; and consequently the first question we have to determine is whether this agreement did constitute a partnership as to third parties, and I think that, assuming it to represent the real transaction, it did not constitute a partnership. It is not an arrangement by which the defendant agrees to carry on the trade in the name of his son, nor even one in which he stipulates for a portion of the profits of that trade; but it is a purchase of an annuity, secured only by the personal promise of the son, the consideration being that the defendant binds himself to make

advances to the son to the extent of £5,000 when required in the business.

In August, 1859, the son married; and prior to his marriage he executed a deed of settlement, which is made a part of this case. This deed was between the son, of the first part, the intended wife, of the second part, and two trustees (of whom the defendant was one), of the third part. It recites the agreements between the son and Fenn for carrying on the son's business under the management of Fenn, and also the agreements between the son and the defendant by which the son bound himself to pay the defendant an annuity, and an agreement, in contemplation of the marriage, by which the son engaged to convey some railway shares and other property, and also all the proceeds of his underwriting business, to trustees, on certain trusts; and then the son does by the deed assign over to the trustees (one of whom is the defendant) all moneys, the proceeds of the underwriting business, then in the hands of Fenn or any other person who might be substituted as manager of the son's business, or thereafter to be, and gave them a power of attorney to recover such moneys from the manager; and then the indenture declares the trusts on which the moneys are to be held. These are, in the first place, to pay the annuity to the defendant; next, to pay the son an allowance of £500 a year, to be increased, if the business prospered, to £750; then, to accumulate the surplus until it amounted to £8,500, and so remained for two years without reduction, when the engagement to pay over the future proceeds of the business to the trustees was to cease. There is a proviso that, at any time during the continuance of the engagement, the trustees were, upon the request of the son, or his manager for the time being, to raise out of the property assigned by the son and the accumulated fund any sum required to meet emergencies occurring in the underwriting business. The ultimate trusts of the accumulated fund, when it should have remained two years without reduction at the sum of £8,500, were to repay any advances made by the defendant under his guarantee, and, subject thereto, for the benefit of the wife and children. Such a settlement as this would be very inconvenient in most trades; but, when the peculiar nature of an underwriting business as carried on at Lloyd's is borne in mind, it seems a prudent enough arrangement. The course of business was stated in Xenos v. Wickham, 14 C. B. N. S. 108 E. C. L. R. 460, 33 L. J. C. P. 13; and we were informed during the course of the argument that it was stated accurately. The premiums are received by the broker, and out of these losses and returns of premiums are paid by him; the balance being paid over to the underwriter at stated intervals. So long, therefore, as the losses do not exceed the ordinary and expected average, the underwriter only receives money; but if the losses exceed the average, so that the whole premiums in the hands of the broker are absorbed by these losses, the underwriter has to find the funds to meet the excess, and it is to be anticipated that at irreg-

ular intervals such extraordinary losses will occur. The underwriter, therefore, ought not to spend the annual proceeds of his trade as if they were clear gain, but should keep a considerable reserve fund. Now, if by a settlement an underwriter binds himself to his trustees to limit his personal expenditure, and to put the residue of the proceeds of the trade in their hands as a reserve fund to meet emergencies of his trade, and, subject to meeting those emergencies, to form a fund for the benefit of his family, he does not bind himself to do that which a prudent man ought to do of his own accord. It is true that, by entering into this agreement, the trustees do take the profits of the trade; and, whilst Waugh v. Carver, 2 H. Bl. 235, was considered as unqualified law, it would have been difficult to say that they did not thereby by operation of law make themselves partners in the trade, and personally responsible, though it may be observed that they do not by this arrangement withdraw the profits from the reach of the creditors, but rather secure that the trader shall not spend them, and that they shall remain as a fund to meet emergencies. But, when we find that the object of their taking the profits of the trade is to keep them as a reserve fund to meet the emergencies of the business, I think it becomes clear that, though they take the profits, they do not cause the business to be carried on for them, and that the participation is not such as to constitute the relation of principal and surety between the trustees of the settlement and the underwriter; and that, according to Cox v. Hickman, 8 H. L. C. 268, is the true question. I think, therefore, that such a settlement does not of itself make the trustees partners in the business.

In the present case, the first trust was to pay the defendant his annuity; and it was argued that, though his co-trustee, Donnison, might not be a partner of a principal in the underwriting business of the son, yet that the defendant, being not only a trustee, but also beneficially interested in the profits when received by him and his co-trustee, was a partner. But, if the previous arrangement between the defendant and his son was really what it purported to be, and the defendant really was an annuity creditor of his son, this arrangement goes no further than did that in Cox v. Hickman, 8 H. L. C. 268. There is only one creditor, instead of many; but in every other respect the words of Lord Cranworth, already cited, are strictly applicable: "The debtor [in this case, the son] is still the person solely interested in the profits, save only that he has transferred them [or, in this case, a part of them] to his creditor, the defendant." The son receives the benefit of the profits as they accrue, though he has precluded himself from applying this portion of them to any other purpose than the payment of this annuity, for which he was already liable. The trade is not carried on by or on account of the annuitant creditor. I think, therefore, that, assuming that the transactions were really what they purport to be, the defendant was not liable as a partner in the business carried on in his son's name.

I come now to consider whether, in the exercise of the power to draw reasonable inferences of fact, we ought to draw the inference that in reality the transactions were not such as they purport to be, but that they were a cloak for a scheme by which the defendant really carried on the business for himself. * * * In the present case I think we are not justified in drawing any such inference. For these reasons, I think that the judgment of the Common Pleas should be reversed.

BRAMWELL, J. In this case the plaintiffs declare that they made a policy of insurance, and that "the defendant, in consideration of a certain premium paid him by the plaintiffs, subscribed the said policy for £100 and became an insurer thereon to the plaintiffs for that amount." The defendant pleads "that he did not subscribe the said policy or become insurer as alleged." And the question is whether the plaintiffs have proved the allegations so traversed. This is the real and ultimate question, because, though this, like other cases, has been argued as though the question were whether the defendant was a partner with somebody else, and though this way of arguing is reasonable enough, as prima facie a partner is liable for the acts of his copartner within the ordinary scope of partnership authority, yet, inasmuch as a man may be a partner and not liable, or not a partner and yet liable, the determination of partnership or no partnership does not settle the question, which still remains, "did the defendant subscribe the policy and become an insurer?" Now, he did not subscribe it with his own hand; nor is he liable on the ground of holding himself out as a partner or principal in this matter, for he has not done so. The only other way in which he can be liable is by reason of his having given authority to the person who signed it so to sign and bind him. The person who did sign it is described in the case as a "clerk," and he signed the name of the defendant's son. Then did the defendant give that person any authority so to sign and bind him? That he did not in words is certain; nor did he in intention; nor did the clerk intend to bind him; nor did his son, nor Fenn; nor did the plaintiffs suppose he was bound, or intend to deal with or trust him, but his son. If, then, he is liable, if he has given such authority, it is against the intentions of all parties. It is in spite of their meaning the contrary, and must therefore be from some force in the nature of the transaction itself. And this may be. If the defendant was really the principal, or one of the principals, in the transaction; if those who acted really were his agents; if, on the truth appearing, he had a right to say the contract was made with him, and to enforce it—he ought to be and would be liable. As, for instance, if there was a business which required the buying of goods on credit, and if a person tried to carry it on in the name of an agent, whether such agency was an agency of a partnership or any other, so that, upon the purchase of goods by the agent or partner, the property vested wholly or in part in the first-named person, then

he would, as it seems to me, be liable, though he had stipulated with his agent or partner that he should not be, because he would have tried for an impossibility, for a thing repugnant in itself, viz., that the contract should be made with him, for his benefit, but not to bind him. It becomes necessary, then, to examine the facts. [After commenting on the facts, the opinion continues:]

Why, then, the deed being bona fide, is the defendant a partner or principal in the business? He can make no contract, nor order one, nor forbid one, nor enforce one, nor release one. If the profits were £10,000 in the year, he would get nothing but his annuity. The residue would go to his son and the trust fund. His annuity would be larger, indeed; but that is unimportant. If there were no profits in any year, he would still be entitled to his £500 annuity. How can this state of facts prove that the defendant "subscribed the said policy and became an insurer"? It seems to me, therefore, that if the defendant is held to have "subscribed this policy and become an insurer," it will be so held, though, as I have said, he has not done so in form nor in substance, and that he has so done somehow, though there is no fraud, without his or any one else concerned intending it. Surely it seems enough to state this to show that it cannot be true, and that therefore the defendant is not liable. The burthen of proof to the contrary is on the plaintiffs. Now, what reason do they give? They say that the defendant is a partner with his son, and that, if not partners inter se, they are so as regards third parties—a most remarkable expression! Partnership means a certain relation between two parties. How, then, can it be correct to say that A. and B. are not in partnership as between themselves, they have not held themselves out as being so, and yet a third person has a right to say that they are so as relates to him? But that must mean inter se; for partnership is a relation inter se, and the word cannot be used except to signify that relation. A. is not the agent of B.; B. has never held him out as such; yet C. is entitled as between himself and B., to say that A. is the agent of B.! Why is he so entitled, if the fact is not so, and B. has not so represented? But "partnership" and a "right to call persons partners as regards third parties," are words, and the thing must be looked at, viz., the taking or sharing of profits, which it is said gives C. a right as against B. to say B. is a partner of A. Why should it? I trust that, in the present state of authority, this question may be freely handled without presumption, and that the goodness of such a rule may be examined; because, though we are bound to administer the law as we find it, yet, when we are considering what is the law, we may not improperly inquire into the reasonableness of that suggested. Why, then, does a taking or sharing of A.'s profits by B. entitle C. to demand payment of B. of A.'s debts in the trade? How, if there is such taking or sharing in this case, does it prove that the defendant "subscribed the policy and became an insurer"? If A. agrees with B. to share profits and

losses, but not to interfere with the business, and not to buy or sell, and does not interfere, nor buy nor sell, and C., knowing this, deals with B., he would have no claim on A. Why should he, if he does not know of it? Why, upon finding out something between A. and B. which has in no way affected or influenced him, should he who has dealt with B. have a claim on A.? It is said, because profits are what the creditor trusts to, they are his fund for payment. This would be a bad reason, if true in fact. A man who trusts another generally has a claim on his profits and capital too. How does a man who trusts the former only more affect the creditor's fund? But, further, it really is not true in substance, only in words. It is not a receipt of profits, in substance, that makes a man liable. If I agree to receive a sum in proportion to profits, as, for instance, a sum equal to a tenth, I am not liable. If I receive a tenth, I am. What is the difference, except in words, at least as far as creditors are concerned? How can one set of words between A. and B. give C. a right, and the same thing in other words not? How many men in a thousand, not lawyers, could be got to understand that, of the two servants of a firm, the one who received a tenth of the profits was liable for its debts, and the other, who has received a sum equal to a tenth, was not? This Mr. Justice Story calls "satisfactory." Satisfactory in what sense? In a practical business sense? No; but in the sense of an acute and subtle lawyer, who is pleased with refined distinctions, interesting as intellectual exercises, though unintelligible to ordinary men, and mischievous when applied to the ordinary affairs of life. Lord Eldon did not think it satisfactory. Such law is a law of surprise and injustice, and against good policy. It fixes a liability on a man contrary to his intent and expectation, and without reason, and gives a benefit to another which he did not bargain for and ought not to have, and prevents that free use of capital and enterprise which is so important. It is said that this is true of a dormant partner. It is not. His existence may be unknown to the creditor; but the dormant partner knows he is liable, and means to be, and the creditor trusts all such persons. He means to deal with all real persons. It may be said that, if this reasoning is right, a man might bargain to receive all the profits of a business and not be liable. The answer is, the thing is impossible. There never was, and never will be, a bona fide agreement by one man to carry on a business, bear all its losses, and pay over all its profits. Should such an agreement appear, it would obviously be colorable. Where there is a chance of profit to the trader, there such an agreement may be honest, and, where honest, ought not to make him liable who is certainly to receive some of the profits, and perhaps all.

I have hitherto dealt with the case on principle. I proceed to examine the authorities. The labor formerly needful is now rendered unnecessary by Cox v. Hickman, 8 H. L. C. 268. That case has settled the law, I may be permitted, I hope, to say, in a perfectly satisfactory man-

ner. It is there laid down that the question in such cases as the present is one of authority, one of agency. Lord Campbell says (page 302): "The defendant can only be liable upon the supposition that the person who wrote the acceptance on the bills of exchange was their mandatory for that purpose." Lord Wensleydale says (page 311): "And the simple question will be this, whether Haywood was authorized by either of the defendants as a partner in that company to bind him by those acceptances." His Lordship proceeds: "Haywood must be taken to have been authorized to accept for them by those who actually carried on business under that firm. Were the appellants partners in it? And further (page 312): "The question, then, is whether this deed makes the creditors who sign it partners with the trustees, or, what is really the same thing, agents to bind them by acceptances on account of the business." And, generally, I refer to his whole judgment, particularly to the passage at page 313, beginning, "Hence it becomes a test of the liability," down to "liable as a partner." Lord Cranworth puts the same two arguments together at page 306. I refer to the passage beginning, "It was argued," and ending, "to have been made." This, then, is our guide for the future.

The question here is, was the underwriter's business carried on by persons acting on the defendant's behalf? Now, it certainly was not. The clerk who signed the policy, Fenn, and the son, acted on the son's behalf; that is, unless the whole is a sham—which, as I have before said, I think is not open to us to consider, nor true, if it were open to us. This ought to dispose of the case. But, even if we assume that the law supposed to exist before Cox v. Hickman, 8 H. L. C. 268, remains untouched—that is to say, the supposed law of Waugh v. Carver, 2 H. Bl. 235—I think the same conclusions ought to be come to. Lord Wensleydale does not notice that case. Lord Cranworth does, and, with submission, gives a better reason for the decision than is to be found in the case itself. The Chief Justice there says the question is whether they have not constituted themselves partners in respect to other persons, and puts his decision on the ground that "he who takes a moiety of all the profits indefinitely shall by operation of law be liable to losses." Let us hope that this notion is overruled—one which I believe has caused more injustice and mischief than any bad law in our books. But, even if not, how is this case within it? By the letter of the 1st of January, 1859, after the business had proved profitable, the son agreed to pay his father, for their joint lives, £500 a year absolutely, not out of profits, nor dependent on them, with a provision for an increase in proportion to profits if they reached beyond a certain amount. This would not make the defendant a receiver of profits, nor give him a right to an account, nor, in fact, bring him within any of the old fancied rules of liability. Then comes the settlement, in which the defendant is a trustee. As far as

the settlement alone is concerned, the defendant is no more liable than the other trustee. And why is he to be liable?

It remains to notice the judgment of the court below. With great respect I think Cox v. Hickman was not followed. The Chief Justice says the deed made the defendant a partner, by giving him an interest in the business; and he finishes by saying the question is whether the creditors may come on the defendant in respect of the profits. But, according to the judgment in Cox v. Hickman, the question does not turn on that. Byles, J., seems to consider the deed as a contrivance for giving the defendant the profits—that in reality it was his business. If so, of course he is liable. Montague Smith, J., says he thinks the deed an arrangement by which the defendant was to have the profits as eo nomine, and that he is liable as a partner. But if Lords Cranworth and Wensleydale have laid down the true rule, it is not that indicated in the last expression.

It seems to me, then, there is here no partnership, no taking of profits, which could have brought the case within what was supposed to be law before Cox v. Hickman, 8 H. L. C. 268; that on reason and principle that supposed law was wrong; that it is now condemned by the authority of Cox v. Hickman; that anyhow Cox v. Hickman is the governing case; and that it lays down rules which decide this in favor of the defendant.

The opinions of the majority of the court being thus in favor of the defendant, the judgment of the court below was reversed.

Judgment reversed.[1]

GRAY, J., IN MEEHAN v. VALENTINE.

(Supreme Court of the United States. 1892. 145 U. S. 619, 12 Sup. Ct. 972, 36 L. Ed. 835.)

How far sharing in the profits of a partnership shall make one liable as a partner has been a subject of much judicial discussion, and the various definitions have been approximate rather than exhaustive.

The rule formerly laid down, and long acted on as established, was that a man who received a certain share of the profits as profits, with a lien on the whole profits as security for his share, was liable as a partner for the debts of the partnership, even if it had been stipulated between him and his copartners that he should not be so liable; but that merely receiving compensation for labor or services, estimated by a certain proportion of the profits, did not render one liable as a partner. Story, Partn. c. 4; 3 Kent, Comm. 25, note, 32–34; Ex parte Hamper, 17 Ves. 403; Pott v. Eyton, 3 C. B. 32, 40; Bostwick v. Champion, 11 Wend. (N. Y.) 571, 18 Wend. (N. Y.) 175, 184, 185, 31 Am. Dec. 376; Burckle v. Eckart, 1 Denio (N. Y.)

[1] Channel, B., delivered a concurring opinion. Shee, J., and Pigott, B., dissented.

337, and 3 N. Y. 132; Denny v. Cabot, 6 Metc. (Mass.) 82; Fitch v. Harrington, 13 Gray (Mass.) 468, 474, 74 Am. Dec. 641; Brundred v. Muzzy, 25 N. J. Law, 268, 279, 674. The test was often stated to be whether the person sought to be charged as a partner took part of the profits as a principal, or only as an agent. Benjamin v. Porteus, 2 H. Bl. 590, 592; Coll. Partn. (1st Ed.) 14; Smith, Merc. Law (1st Ed.) 4; Story, Partn. § 55; Loomis v. Marshall, 12 Conn. 69, 78, 30 Am. Dec. 596; Burckle v. Eckart, 1 Denio (N. Y.) 337, 341; Hallet v. Desban, 14 La. Ann. 529.

Accordingly, this court, at December term, 1860, decided that a person employed to sell goods under an agreement that he should receive half the profits, and that they should not be less than a certain sum, was not a partner with his employer. "Actual participation in the profits as principal," said Mr. Justice Clifford in delivering judgment, "creates a partnership as between the parties and third persons, whatever may be their intentions in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits," or "may have expressly stipulated with his associates against all the usual incidents to that relation. That rule, however, has no application whatever to a case of service or special agency, where the employé has no power as a partner in the firm and no interest in the profits, as property, but is simply employed as a servant or special agent, and is to receive a given sum out of the profits, or a proportion of the same, as a compensation for his services." Berthold v. Goldsmith, 24 How. 536, 542, 543, 16 L. Ed. 762. See, also, Seymour v. Freer, 8 Wall. 202, 215, 222-226, 19 L. Ed. 306; Beckwith v. Talbot, 95 U. S. 289, 293, 24 L. Ed. 496; Edwards v. Tracy, 62 Pa. 374; Burnett v. Snyder, 81 N. Y. 550, 555, 37 Am. Rep. 527.

Mr. Justice Story, at the beginning of his Commentaries on Partnership, first published in 1841, said: "Every partner is an agent of the partnership; and his rights, powers, duties, and obligations are in many respects governed by the same rules and principles as those of an agent. A partner, indeed, virtually embraces the character both of a principal and of an agent. So far as he acts for himself and his own interest in the common concerns of the partnership, he may properly be deemed a principal; and so far as he acts for his partners, he may as properly be deemed an agent. The principal distinction between him and a mere agent is that he has a community of interest with the other partners in the whole property and business and responsibilities of the partnership; whereas an agent, as such, has no interest in either. Pothier considers partnership as but a species of mandate, saying, 'Contractus societatis, non secus ac contractus mandati.'" Afterwards, in discussing the reasons and limits of the rule by which one may be charged as a partner by reason of having received part of the profits of the partnership, Mr. Justice Story observed that the rule was justified, and the cases in which it had been

applied reconciled, by considering that "a participation in the profits will ordinarily establish the existence of a partnership between the parties in favor of third persons, in the absence of all other opposing circumstances," but that it is not "to be regarded as anything more than mere presumptive proof thereof, and therefore liable to be repelled and overcome by other circumstances, and not as of itself overcoming or controlling them," and therefore that, "if the participation in the profits can be clearly shown to be in the character of agent, then the presumption of partnership is repelled." And again: "The true rule, ex æquo et bono, would seem to be that the agreement and intention of the parties themselves should govern all the cases. If they intended a partnership in the capital stock, or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as partners to the public, or their conduct operated as a fraud or deceit upon third persons." Story, Partn. §§ 1, 38, 49. * * *

The decision [in Cox v. Hickman] was put upon the ground that the liability of one partner for the acts of his copartner is in truth the liability of a principal for the acts of his agent; that a right to participate in the profits, though cogent, is not conclusive, evidence that the business is carried on in part for the person receiving them; and that the test of his liability as a partner is whether he has authorized the managers of the business to carry it on in his behalf. Cox v. Hickman, 8 H. L. Cas. 268, 304, 306, 312, 313, nom. Wheatcroft v. Hickman, 9 C. B. (N. S.) 47, 90, 92, 98, 99.

This new form of stating the general rule did not at first prove easier of application than the old one; for in the first case which arose afterwards one judge of three dissented (Kilshaw v. Jukes, 3 Best. & S. 847); and in the next case the unanimous judgment of four judges in the Common Bench was reversed by four judges against two in the Exchequer Chamber (Bullen v. Sharp, 18 C. B. [N. S.] 614, and L. R. 1 C. P. 86). And, as has been pointed out in later English cases, the reference to agency as a test of partnership was unfortunate and inconclusive, inasmuch as agency results from partnership rather than partnership from agency. Kelly, C. B., and Cleasby, B., in Holme v. Hammond, L. R. 7 Exch. 218, 227, 233; Jessel, M. R., in Pooley v. Driver, 5 Ch. Div. 458, 476. Such a test seems to give a synonym, rather than a definition; another name for the conclusion, rather than a statement of the premises from which the conclusion is to be drawn. To say that a person is liable as a partner, who stands in the relation of principal to those by whom the business is actually carried on, adds nothing by way of precision, for the very idea of partnership includes the relation of principal and agent.

In the case last above cited, Sir George Jessel said: "You cannot

grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners—a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity." And in a very recent case the Court of Appeals of New York, than which no court has more steadfastly adhered to the old form of stating the rule, has held that a partnership, though not strictly a legal entity as distinct from the persons composing it, yet being commonly so regarded by men of business, might be so treated in interpreting a commercial contract. Bank v. Thompson, 121 N. Y. 280, 24 N. E. 473.

In other respects, however, the rule laid down in Cox v. Hickman has been unhesitatingly accepted in England, as explaining and modifying the earlier rule. In re English & Irish Society, 1 Hem. & M. 85, 106, 107; Mollwo v. Court of Wards, L. R. 4 P. C. 419, 435; Ross v. Parkyns, L. R. 20 Eq. 331, 335; Ex parte Tennant, 6 Ch. Div. 303; Ex parte Delhasse, 7 Ch. Div. 511; Badeley v. Bank, 38 Ch. Div. 238. See, also, Davis v. Patrick, 122 U. S. 138, 151, 7 Sup. Ct. 1102, 30 L. Ed. 1090; Eastman v. Clark, 53 N. H. 276, 16 Am. Rep. 192; Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. 295, 57 Am. Rep. 552; Seabury v. Bolles, 51 N. J. Law, 103, 16 Atl. 54, 11 L. R. A. 136; and 52 N. J. Law, 413, 21 Atl. 952, 11 L. R. A. 136; Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282.

In the present state of the law upon this subject, it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit, and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; that each is agent for the firm and for the other partners; that each receives part of the profits as profits, and takes part of the fund to which the creditors of the partnership have a right to look for the payment of their debts; that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons. And participating in profits is presumptive, but not conclusive, evidence of partnership.

In whatever form the rule is expressed, it is universally held that an agent or servant, whose compensation is measured by a certain proportion of the profits of the partnership business, is not thereby made a partner, in any sense. So an agreement that the lessor of a hotel shall receive a certain portion of the profits thereof by way of rent does not make him a partner with the lessee. Perrine v. Hankinson, 11 N. J. Law, 181; Holmes v. Railroad Co., 5 Gray (Mass.) 58;

Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465. And it is now equally well settled that the receiving of part of the profits of a commercial partnership, in lieu of or in addition to interest, by way of compensation for a loan of money, has of itself no greater effect. Wilson v. Edmonds, 130 U. S. 472, 482, 9 Sup. Ct. 563, 32 L. Ed. 1025; Richardson v. Hughitt, 76 N. Y. 55, 32 Am. Rep. 267; Curry v. Fowler, 87 N. Y. 33, 41 Am. Rep. 343; Cassidy v. Hall, 97 N. Y. 159; Smith v. Knight, 71 Ill. 148, 22 Am. Rep. 94; Williams v. Soutter, 7 Iowa, 435, 446; Boston & C. Smelting Co. v. Smith, 13 R. I. 27, 43 Am. Rep. 3; Mollwo v. Court of Wards, and Badeley v. Bank, above cited.

In some of the cases most relied on by the plaintiff, the person held liable as a partner furnished the whole capital on which the business was carried on by another, or else contributed part of the capital and took an active part in the management of the business. Beauregard v. Case, 91 U. S. 134, 23 L. Ed. 263; Hackett v. Stanley, 115 N. Y. 625, 627, 628, 633, 22 N. E. 745; Pratt v. Langdon, 12 Allen (Mass.) 544, 97 Mass. 97, 93 Am. Dec. 61; Rowland v. Long, 45 Md. 439. And in Mollwo v. Court of Wards, above cited, after speaking of a contract of loan and security, in which no partnership was intended, it was justly observed: "If cases should occur where any persons, under the guise of such an arrangement, are really trading as principals, and putting forward, as ostensible traders, others who are really their agents, they must not hope by such devices to escape liability, for the law, in cases of this kind, will look at the body and substance of the arrangements, and fasten responsibility on the parties according to their true and real character." L. R. 4 P. C. 438. But in the case at bar no such element is found. * * *

BEECHER et al. v. BUSH et al.

(Supreme Court of Michigan, 1881. 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465.)

COOLEY, J. The purpose of the action in the court below was to charge Beecher as partner with Williams for a bill of supplies purchased for the Biddle House in Detroit. Beecher was owner of the Biddle House, and Williams proposed in writing to "hire the use" of it from day to day, and open and keep it as a hotel. Beecher accepted his proposals and Williams went into the house and began business, and in the course of the business made this purchase. The proposals are set out in full in the special verdict. The question is whether by accepting the proposals Beecher made himself a partner with Williams in the hotel business; and this is to be determined on the face of the writing itself. It is conceded that Beecher was never held out to the public as a partner, and that the bill of supplies

was purchased on the sole credit of Williams and charged to him on the books of the plaintiffs below. The case, therefore, is in no way embarrassed by any questions of estoppel, for Beecher has done nothing and suffered nothing to be done which can preclude him from standing upon his exact legal rights as the contract fixed them.

Nor do we understand it to be claimed that the parties intended to form a partnership in the hotel business, or that they supposed they had done so, or that either has ever claimed as against the other the rights of a partner. It is perfectly clear that many things which are commonly incident to a partnership these parties meant should be wholly excluded from their arrangement. Some of these were of primary importance. It is plain, for example, that Beecher did not understand that his credit was to be in any way involved in the business, or that he was to have any interest in the supplies that should be bought, or any privilege to decide upon them, or any legal control whatever until proceeds were to be divided, or any liability to losses if losses were suffered. These are among the common incidents to a partnership; and while some of them, and possibly all of them, may not be necessary incidents, yet the absence of all is very conclusive that the parties had no purpose whatever to form a partnership, or to give to each other the rights and powers, and subject each other to the obligations of partners. In general this should be conclusive. If parties intend no partnership the courts should give effect to their intent unless somebody has been deceived by their acting or assuming to act as partners; and any such case must stand upon its peculiar facts and upon special equities. * * *

We have then a case in which the party it is sought to charge has not held himself out, or suffered himself to be held out as a partner either to the public at large or to the plaintiff, and has not intended to form that relation. He is not therefore a partner by estoppel nor by intent; and if he is one at all, it must be by construction of law. What, then, are the indicia of partnership in this case—the marks which force that construction upon the court irrespective of the intent of the parties, that in fact control their intent and give to the parties bringing suit rights which they were not aware of when they sold the supplies? In the elaborate and able brief which has been presented in behalf of the defendants in error it is conceded that the fact that Beecher was to receive each day a sum "equal to one-third of the gross receipts and gross earnings" for the day would not necessarily make him a partner. What is claimed is that the fact is "cogent evidence" that Beecher was to participate in the results of the business in a manner that indicated he was a principal in it, and was not receiving compensation for the use of property merely. The view of the law here suggested is undoubtedly correct. There may be a participation in the gross returns that would make the receiver a partner, and there may be one that would not. The question is in what capacity is participation had. Gross returns are not profits and

may be large when there are no profits, but it cannot be predicated of either gross returns or profits that the right to participate is conclusive evidence of partnership. This is settled law both in England and in this country at this time, as is fully shown by the authorities cited for the defendants in error. It was recognized in Hinman v. Littell, 23 Mich. 484; and in New York, where the doctrine that participation in profits proves partnership has been adhered to most closely, it is admitted there are exceptions. Eager v. Crawford, 76 N. Y. 97.

But we quite agree with counsel for defendants in error that no case ought to turn upon the unimportant and mere verbal distinction between the statement in the papers that Beecher was to have a sum "equal to" one-third of the gross receipts and gross earnings, and a statement that he was to have one-third of these receipts and earnings. It is perfectly manifest it was intended he should have one-third of them; that they should be apportional to him regularly and daily, and not that Williams was to appropriate the whole and pay a sum "equal to" Beecher's proportion when it should be convenient. We can conceive of cases where the difference in phraseology might be important, because it might give some insight into the real intent and purpose of the parties, and throw light upon the question whether that which was to be received, was to be received as partner or only by way of compensation for something supplied to the other, but the intent in this case is too manifest to be put aside by any mere ingenuity in the use of words. Loomis v. Marshall, 12 Conn. 69, 79, 30 Am. Dec. 596.

In Cox v. Hickman, 8 H. L. Cas. 268, 506, Lord Cranworth stated very clearly his views of what should be the test of partnership. "It is often said," he says, "that the test, or one of the tests, whether a person not ostensibly a partner is nevertheless in contemplation of law a partner, is whether he is entitled to participate in the profits. This is no doubt in general a sufficiently accurate test; for a right to participate in the profits affords cogent, often conclusive evidence that the trade in which the profits have been made was carried on in part for or on behalf of the person setting up such a claim. But the real ground of the liability is that the trade had been carried on by persons acting on his behalf. When that is the case he is liable in the trade obligations, and entitled to its profits or to a share of them. It is not strictly correct to say that his right to share in the profits makes him liable to the debts of the trade. The correct mode of stating the proposition is to say that the same thing which entitles him to the one makes him liable to the other, namely, the fact that the trade has been carried on in his behalf; i. e. that he stood in the relation of principal to the persons acting ostensibly as the traders by whom the liabilities have been incurred, and under whose management the profits have been made." There is something understandable by the common mind in this test; there is nothing artificial or arbitrary about it; it falls in with reason and enables every man to know when he makes

his business arrangements whether he runs the risk of extraordinary liabilities contracted without his consent or approval.

It is said, and we believe justly, in Bullen v. Sharp, L. R. 1 C. B. 86, that the decision in Cox v. Hickman brought back the law of England to what it should be, and Mr. Baron Bramwell, referring to what was declared to be law in Waugh v. Carver, 1 H. Bl. 235, expressed the hope "that this notion is overruled," adding that it is "one which I believe has caused more injustice and mischief than any bad law in our books." Page 127. It is certainly overruled very conclusively in Great Britain. Kilshaw v. Jukes, 3 B. & S. 847; Shaw v. Gault, 16 Irish C. L. 357; Holme v. Hammond, L. R. 7 Exch. 218; Ex parte Delhasse, 7 Ch. Div. 411. And though in New York courts hampered somewhat by early cases have not felt themselves at liberty to adopt and follow the decision in Cox v. Hickman to the full extent, it would be easy to show that the American authorities in the main are in harmony with it. [The court, after examining numerous cases, continues:]

It is needless to cite other cases. They cannot all be reconciled, but enough are cited to show that in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests it was erroneous and mischievous and the proper correction has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership when none exists, he is never to be charged as a partner unless by contract and with intent he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least the following: Community of interest in some lawful commerce or business, for the conduct of which the parties eventually are principals of and agents for each other, with general powers within the scope of the business, which powers however by agreement between the parties themselves may be restricted at option, to the extent even of making one the sole agent of the others and of the business.

In this case we have the lawful commerce or business, namely, the keeping of the hotel. We have also in some sense a community of interest in the proceeds of the business, though these are so divided that all the profits and all the losses are to be received and borne by one only. But where in the eventual arrangements does it appear, that either of the parties clothed the other with an agency to act on his behalf in this business? We speak now of intent merely, and not of any arbitrary implication of intent which the law, according to some authorities, may raise irrespective of and perhaps contrary to the intent. Could Beecher buy for the business a dollar's worth of provisions? Could he hire a porter or a waiter? Could he discharge one? Could he say the house shall be kept for fastidious guests exclusively and charges made in proportion to what they demand, or on the other hand that the tables shall be plain and cheap so as to

attract a greater number? Could he persist in lighting with gas if Williams chose something different, or reject oil if Williams saw fit to use it? Was a servant in the house at his beck or disposal, or could he turn off a guest that Williams saw fit to receive or receive one that Williams rejected as unfit? In short what one act might he do or authority exercise, which properly pertains to the business of keeping hotel, except merely the supervision of accounts, and this for the purpose of accounting only? And how could he be principal in a business over which he had absolutely no control? Nor must we forget that this is not a case in which powers which might otherwise be supposed to exist are taken away or excluded by express stipulation; but they are powers which it is plain from their contract the parties did not suppose would exist, and therefore have not deemed it necessary to exclude.

On the other hand, what single act are we warranted in inferring the parties understood Williams was to do for and as the agent of Beecher? Not to furnish supplies surely, for these it was expressly agreed should be furnished by Williams and paid for daily. Not to contract debts for water and gas bills and other running expenses, for by the agreement there were to be no such debts. Nor was this an agreement merely that expenses incurred for both were to be met without the use of credit, but it was expressly provided that they were to be the expenses of one party only, and to be used by him from his own means. There was to be no employment of credit, but it was the credit of Williams alone that was in the minds of the parties.

It is difficult to understand how the element of agency could be more perfectly eliminated from their arrangements than it actually was. Beecher furnished the use of the hotel and a clerk to supervise the accounts, and received for so doing one-third the gross returns. It was not understood that he was to intermeddle in any way with the conduct of the business so long as Williams adhered to the terms of the contract. If the business was managed badly Beecher might be loser, but how could he help himself? He had reserved no right to correct the mistakes of Williams, supply his deficiencies or overrule his judgments. He did indeed agree to take and account for whatever furniture should be brought into the house by Williams, but the bringing any in was voluntary, and so far was Beecher from undertaking to pay to the sellers the purchase price, that on the contrary the value was to be offset against the deterioration of that which Beecher supplied; and it was quite possible that, as between himself and Williams, there might be nothing to pay. And while Williams was not compellable to put any in, Beecher, on the other hand, had no authority to put any in at the cost of Williams.

It is plain, therefore, that if there is any agency in this case for Beecher to act for Williams, or Williams to act for Beecher, it is an agency implied by law, not only without having expressed a purpose that an agency shall exist, but in spite of the plain intent that

none shall exist. If therefore we shall say that agency of each to act for the other, or agency of one to act for both in the common business, is to be the test of partnership, or to be one of the tests, but that the law may imply the agency irrespective of the intent, and then imply the partnership from the agency, we see at once that the test disappears from all our calculations. To imply something in order that that something may be the foundation whereupon to erect an implication of something else is a mere absurdity. The test of partnership must be found in the intent of the parties themselves. They may say they intend none when their contract plainly shows the contrary; and in that case the intent shall control the contradictory assertion; but here the intent is plain.

We have not overlooked any one of the circumstances which on the argument were pointed out as peculiar to this case. None of them is inconsistent with the intent that Beecher was to be paid for the use of his building and furniture merely. He retained possession; but a reason for this appears in the power he reserved to terminate the arrangement whenever the contract was broken by Williams. Being in possession, he might suppose he could eject Williams without suit. He might also think it important to the reputation of the hotel that no landlord should be in debt for supplies or for servants' wages; and for that reason require cash payments. It is easy to see that as lessor he might have had an interest in all the stipulations to which Williams' assent was required. [After deciding that defendant could not be treated as a dormant partner, the opinion concludes:]

Our conclusion is that Beecher and Williams, having never intended to constitute a partnership, are not as between themselves partners. There was to be no common property, no agency of either to act for the other or for both, no participation in profits, no sharing of losses. If either had failed to perform his part of the agreement, the remedy of the other would have been a suit at law, and not a bill for an accounting in equity. If either had died the obligations he had assumed would have continued against his representatives. We also think there can be no such thing as a partnership as to third persons when as between the parties themselves there is no partnership and the third persons have not been misled by concealment of facts or by deceptive appearances.

The judgment must be reversed with costs and a new trial ordered.

JOHNSON BROS. v. CARTER & CO. et al.

(Supreme Court of Iowa, 1903. 120 Iowa, 355, 94 N. W. 850.)

Action on a promissory note of $1,232.12, signed "Carter & Co., by J. E. Carter," dated February 7, 1900, and payable in 60 days. The petition alleges that the defendant Brown was a member of that firm, and as such liable on the note. The defendant put these alle-

gations in issue. After plaintiffs had introduced their evidence, the court directed a verdict for the defendant. Judgment was entered thereon, and the plaintiffs appeal.

LADD, J. [McGee, Kahman & Co., having entered into a contract with the Ft. Dodge & Omaha Railroad Company to grade its entire road, made a subcontract with J. E. Carter to grade two miles thereof. Carter, not having the necessary capital to carry on the work, agreed with Brown, a banker, to give him one-half of the profits if he would furnish the money and also a man, whose time was to offset that of Carter, who was to keep the books and oversee the work. Brown furnished John Campbell, who kept the books in the name of Carter & Co. and transacted all the business, buying all supplies and handling all funds, while Carter had charge of the men doing the work. The men employed were boarded, and the price of board deducted from their wages. The note sued on was for supplies bought by Campbell and by his direction charged to Carter & Co. Brown honored sight drafts on his bank, signed "Carter & Co.," and received notes so signed for moneys advanced. Upon the completion of the grading contract, including three additional miles, Carter executed his note to Brown for one-half of the cost of the horses, scrapers, etc., bought during the season and remaining on hand. On the one hand, plaintiff contends that there was sufficient evidence to carry the question of partnership to the jury, while, on the other, defendant insists that the evidence shows what the agreement was, and that it was properly construed as not creating the relationship of partners between Brown and Carter.]

It may be conceded that, where an agreement is fully proven and is not ambiguous in terms, the court should declare its meaning, and define the rights and obligations of the parties created thereby. But we do not think this is such a case. While the firm name of Carter & Co. was apparently selected for convenience in bookkeeping, there is nothing to indicate that it was not to include both parties to the enterprise. Brown's employment of Campbell, at his own expense, to act as bookkeeper and to handle the funds of Carter & Co., as an offset to Carter's time, together with his assurance of Campbell's full authority to act for him, are circumstances tending to show that such was their intention. True, he advanced the money to execute the contract; but he was a banker, and under the arrangement was to receive for its use the highest legal rate of interest. In these circumstances, the stipulation for one-half the net profits of the enterprise is more consistent with the theory of a partnership than a mere loan. The use of the words "net profits" may well have been understood as profits after the payment of interest. Both parties appreciated that large expenditures would be necessary, and the reference to such profits cannot be held, as a matter of law, to exclude the inference of the obligation of each to bear his just proportion of the losses, if any should occur. The thought, doubtless, was that all expenses

should be paid out prior to the division of gains. If the money advanced was merely loaned to Carter, how happened it to be handled exclusively by Brown's representative, all purchases made by him, and everything done in the name of Carter & Co.? Possibly inferences explanatory of this may be drawn from the evidence, but not necessarily so. The conclusion that there was a partnership seems quite as reasonable. Of course, the mere sharing of profits will not be construed as establishing the partnership relation. Ruddick v. Otis, 33 Iowa, 402. But it is an important circumstance to be taken into consideration. The obligation to share losses is an essential element to its existence. Winter v. Pipher, 96 Iowa, 17, 64 N. W. 663. But enterprises are not usually undertaken with a view of loss, and the mere fact that provision therefor is not expressly made does not preclude the inference that each partner is to bear his portion of the burdens, as well as reap his share of the benefits, of the venture. "An agreement to share profits, nothing being said about losses, amounts prima facie to an agreement to share losses also; for it is but fair that the chance of gain and of loss should be taken by the same persons, and it is natural to suppose that it was their intention, if they have said nothing to the contrary; and accordingly it has been held that, unless an intention to the contrary can be shown, persons engaged in any business or venture, and sharing the profits to be derived from it, are partners as regards the business or adventure." 1 Lindley on Partnership (Ewell) 30. [After examining various Iowa cases, the opinion continues:] From these authorities may be deduced, as established in this state, the following principles: (1) That the agreement only to share profits will not constitute partnership, though evidence of existence of that relation. (2) The sharing of losses is essential in a partnership, though the undertaking to do so may be inferred from an agreement to divide profits, unless precluded by the terms thereof. (3) That payment for services, or for the use of money or property to be used in the business, may consist of a share of profits, without making of the loaner or employé a partner. The absence of any participation in or control of the business is generally mentioned as indicating that a party is not a partner; and, of course, the converse must follow. Indeed, it will be found, in most of the cases where the relationship is declared to exist inter se, the party held has enjoyed a direct, rather than merely a contingent, interest in the enterprise. The use of the term "partnership" is not essential, and the adoption of a firm name may be dispensed with. The facts of no two cases are exactly alike. The only crucial test seems to be the intention of the parties. If it appears to have been their purpose to enter into the relation of partners, all subterfuges of either, resorted to in order to evade liability for possible losses, while securing certainty of the advantages to be derived from the relation, must be disregarded. Brown was careful to guard his portion of the prospective profits. From what he did, in agreeing to a

firm name, though ostensibly for convenience in bookkeeping, in acquiescing in its use in all matters connected with the enterprise, in the division of the profits after exacting the highest legal rate of interest for money supplied, in furnishing a man to act in his behalf in transacting the business as an offset to the labor of Carter in overseeing the employés, in taking Carter's note for the cost of half, instead of all, the materials bought and remaining on hand, and in admitting that Campbell, in making use of the firm name "Carter & Co.," had full authority to represent him, it might have been inferred that he was not merely acting as a money loaner, but as a partner, and that both he and Carter so understood in the selection of a firm name, and so intended in carrying on their joint enterprise.

Judgment reversed.

III. Common Enterprise or Business.

BURT v. LATHROP et al.

(Supreme Court of Michigan, 1883. 52 Mich. 106, 17 N. W. 716.)

Campbell, J. Plaintiff sued a large number of defendants as jointly liable to him for his services as attorney in defending some patent suits concerning the rights to use certain hard-rubber material in dentistry. He declared specially and with the common counts for these services, and also set up two judgments rendered in Jackson county for the same causes of action. Upon trial court below ordered a verdict for defendants. The counts which describe the judgments do not set them out in such a way as to make out any legal liability under them against all these defendants, and the proofs are not any more definite. It appears affirmatively that no jurisdiction existed to bind more than a part of them, and there can be nothing claimed for them under the issue as presented. They may, therefore, be laid aside. The ground for asserting a claim against the defendants jointly is that they are claimed to have become members of an association combined for the purpose of legal resistance to the claims of a patentee, and that plaintiff was employed by their officers.

There is no testimony tending to show any immediate personal employment of plaintiff by the defendants, jointly or individually, so as to justify this joint action. But it was claimed that they stood on the footing of partners, bound by the action of their designated managing members. The testimony indicates that several of the defendants, at various times, became members of an association which, so far as pertinent to this inquiry, required them to pay five dollars each into the treasury, and to pay such assessments as should be levied pro rata, on pain of being left out of the association and its privileges. The officers were to employ counsel, and money was to be paid on the order of the president and secretary.

We can find in this arrangement nothing analogous to a partnership. There was no common business, and nothing involving profit and loss in a business sense. No one was empowered to make contracts binding on the subscribers personally, and no one was to be liable except for assessments, nor even for those except as he saw fit to pay them to keep his membership. It was nothing more than a combination which may have made the parties in some respects responsible to each other, but which did not, we think, authorize any contract with third persons which should bind any member personally beyond his assessments. As plaintiff was not only aware of the articles, but showed that he acted under them and in furtherance of them in various ways, no question arises in the nature of an equitable estoppel. We are not concerned on this record whether plaintiff has any other adequate means of securing compensation. The only question now is whether these defendants are his joint debtors. We think they are not.

Judgment affirmed.

BUTLER SAVINGS BANK v. OSBORNE et al.

(Supreme Court of Pennsylvania, 1893. 159 Pa. 10, 28 Atl. 163, 39 Am. St. Rep. 665.)

WILLIAMS, J. The question raised on this record grows out of the following facts: The firm of D. Osborne & Bros. was engaged in drilling oil wells, and producing oil. It was an owner of some leases on which it was operating, and a part owner, as a tenant in common with other part owners, in others. In the same district, the firm of Carruthers & Peters was engaged in the same business, and in the same manner. Each of these firms bought an undivided one-half of two leases, known, respectively, as the "Cookman Lease" and the "Duncan Lease." Both leases were obtained from the same vendor, who was engaged in drilling a well upon one of them at the time of sale. The sale included the drilling tools and machinery in actual use, and it was agreed that Duncan, their vendor, should proceed to complete the work of drilling he had begun. When this was done, the two firms proceeded to prepare the well for pumping, each paying one-half of the expenses incurred. As soon as the first well was put in order, the owners entered into an agreement with each other to drill another well on the same lease, and to pay their one-half part of the cost of it. They divided the expenses incurred in pumping and in the care of the leases in the same manner, each paying one-half. The oil produced was run into pipe lines serving the district, and there credited, one-half to Osborne & Bros., and one-half to Carruthers & Peters.

Upon these facts the appellant contends that the tenants in common of the Cookman and Duncan leases became partners. It is not alleg-

ed that any contract of partnership was ever entered into between the two firms, or that any new partnership name was adopted to represent them in their operations upon these leases. Their relation towards each other, as the result of their purchase of their respective interests in the leases, was that of tenants in common. They were engaged in the development and operation of the common property for their individual benefit. They were doing what tentants in common may properly do, and in the only way practicable for them, viz. turning the common property to the profit of its owners at their individual cost, and dividing the product between themselves, in the pipe lines, in shares corresponding with their interest in the title. The firm of D. Osborne & Bros. seems to have been badly in debt. The Butler Savings Bank was among its creditors, and was the holder of two judgments against the firm and the individuals composing it, on which writs of fieri facia's were issued on 29th of June, 1892. The appellant was also a creditor, having one or more judgments entered against the firm. On the 2d of July, 1892, it caused a special writ of fi. fa. to be issued directing the sheriff to levy on the interest of D. Osborne & Bros. in an alleged partnership composed of the firms of D. Osborne & Bros. and Carruthers & Peters. The sheriff seized and sold, at the instance of the bank, the title of Osborne & Bros. in both leases. At the instance of the appellant, he seized and sold the interest of Osborne & Bros. in the alleged new firm.

Whether the appellant is entitled to come in on the fund raised by the sheriff by means of a sale made upon all the writs in his hands depends on whether the alleged partnership between the tenants in common had any existence. If it did, the two leases were partnership property belonging to that partnership. The interest of Osborne & Bros. would, in that case, go to the purchaser at sheriff's sale, subject to a settlement of the partnership business, and would be simply a right to receive one-half of what might remain after that business was closed up, and the proceeds of such sale would go to the special writ of fi. fa. If, on the other hand, no such partnership existed, then the title of D. Osborne & Bros. was that of a tenant in common owning one-half of the leases. The purchaser at sheriff's sale would succeed to their title, and the money raised would go to the bank, as the proceeds of the sale of the property of its debtor. In the case of Dunham v. Loverock, 158 Pa. 197, 27 Atl. 990, 38 Am. St. Rep. 838, we have held, at the present term, that tenants in common engaged in the improvement or development of the common property will be presumed, in the absence of proof of a contract of partnership, to hold the same relation to each other during such improvement or development as before it began. As to third persons, they may subject themselves to liability as partners by a course of dealing, or by their acts and declarations; but as to each other their relation depends on their title, until, by their agreement with each other, they change it. The act of 25th April, 1850, gives the courts jurisdiction in equity

over the settlement of accounts between tenants in common of mines and minerals, and empowers them to "cause to be ascertained the quantity and value of the coal, iron ore or other minerals, so taken respectively by the respective parties, and the sum that may be justly and equitably due by, and from, and to, them respectively therefor, according to the respective portions and interests to which they may be respectively entitled in the lands." This power over the accounts between tenants in common was exercised by the courts of equity in England long before our statute was passed, and, as between the tenants in common and third parties, the same controversy frequently arose that exists in this case. The effort of third parties, extending credit to them, was to hold them liable as partners, just as the appellant seeks to do here. But the rule in England, as I understand it to be, is that when tenants in common agree to carry on mining operations upon their land, each contributing towards the expenses in proportion to his or her respective interest or estate in the land, they will be considered, with respect both to themselves and third persons, as the ordinary owners of land working their respective shares of the mines, responsible only for their own acts, subject to no laws of partnership whatever, and possessing distinct rights in the property. Bainb. Mines, c. 9, p. 296. The several owners may form a partnership for the purpose of operating the common property, if they so agree; but in the absence of an agreement they will be presumed to deal with each other and the common property as part owners, holding as tenants in common, and liable to each other in account render-ed or in equity, as the circumstances may seem to require. In the case now before us, there is no need to rely on the presumption, as the auditor has found, as a fact, that no partnership existed between the two firms owning the Cookman and Duncan leases. From this finding of fact the auditor correctly concluded, as a matter of law, that the special writ of fieri facias issued by the appellant against the interest of D. Osborne & Bros. in the alleged partnership had nothing on which it could be executed. The contention of the appellant fails, therefore, on both grounds. The law does not imply a partnership between tenants in common because of the fact that they agree to develop or operate the common property, since they may rightfully do this by virtue of their respective titles as part owners; and, next, the existence of an express agreement creating a partnership is negatived by the finding of the auditor, concurred in by the court below. As it is thus settled that the alleged partnership did not exist, the conclusion is inevitable that the sale on the writ in favor of the bank passed the title of D. Osborne & Bros. in the two leases to the sheriff's vendee, who thereupon became a tenant in common with the other part owner. The proceeds of the sale were therefore properly distributed in the court below, and the decree of distribution is affirmed.

LOGAN v. OKLAHOMA MILL CO.

(Supreme Court of Oklahoma, 1904. 14 Okl. 402, 79 Pac. 103.)

BURWELL, J. G. H. Logan and R. C. Brennen bought two farms, and had the titles conveyed to themselves jointly. During the three or four years that they owned the land, Brennen farmed it to wheat, Logan paying for half of his time and half of the expenses. Brennen each year sold the wheat to the defendant in error, collecting the money for the same, and paid Logan his half, except for the year 1901, which is in controversy in this action. The evidence, we think, also shows that the defendant was in possession of facts which would charge him with notice of the arrangement between Logan and Brennen. In June or July of 1901 Brennen sold to the defendant some 2,000 bushels of wheat which was grown on the Logan and Brennen farm, and the defendant contends that he agreed to apply the wheat on the payment of a debt from his son to the mill, while Brennen testified that he agreed to apply only his half of the wheat to the payment of his son's debt. Tickets to the amount of $500 were surrendered and applied in that way, and the other tickets for 948 bushels, amounting to $455.04, were by Brennen turned over to Mr. Logan, who presented them for payment, and the defendant refused to take them up, and assigned as a reason that the wheat was to be applied on the debt of Brennen's son. In fact, the defendant had declined to pay Brennen the amount of the Logan tickets before they were turned over to Logan, and gave that as a reason therefor. Logan then commenced this suit, alleging that he had sold and delivered to defendant 948 bushels of wheat at 48 cents per bushel, and that there was still due and unpaid therefor the sum of $455.04. The answer was a general denial. On this state of facts the trial court found for the defendant, and taxed the costs to the plaintiff, who appeals to this court. * * *

It is first contended by the defendant that the plaintiff had no legal capacity to sue, because Logan and Brennen were partners, and suit could only be maintained by them as such. * * *

This brings us to a consideration of the legal status of Logan and Brennen, and, in presenting this matter, the appellee insists that Logan and Brennen were partners, while the appellant maintains that they were tenants in common. It is sometimes quite difficult to determine whether persons are tenants in common or partners, but, when measured by the rules laid down by the law writers, the case at bar can be classified, leaving no room for reasonable doubt. It has long since been the settled law that persons may be joint owners of real estate or other property, and not be partners. In other words, joint ownership does not necessarily mean partnership. In Lindley on Partnerships, vol. 1, bottom of page 122, it is said: "No partnership necessarily subsists amongst persons to whom property descends, or is

given jointly or in common; and, even if several persons agree to buy property to hold jointly or in common, although by the purchase they become co-owners, they do not become partners, unless that also was their intention." The Supreme Court of Illinois, in the case of Ryhiner et al. v. Feickert, 92 Ill. 305, 34 Am. Rep. 130, had occasion to consider the effect of naming two persons as payees in a note; and it was there held that the mere fact that a note ran to Charles and William Feickert, did not, as a matter of law, authorize the public to assume that they were partners, and that it required the indorsement of both to effect a legal transfer. The Supreme Court of California, in Quackenbush v. Sawyer, 54 Cal. 439, stated the rule as follows: "A mere joint ownership in personal property does not constitute a partnership; nor was a partnership created by an agreement to divide the income of a business carried on by a third party with the joint property of the plaintiff and defendant and paid to the latter for the joint use of himself and the plaintiff." One of the tests of a partnership is: Can either party sell his part of the property or thing in question, and his grantee compel recognition of his rights? If he can, then it is not a partnership, as one cannot purchase the interest of one partner in a business, and then compel the other partner, against his will, to continue the business with him. See Kent's Commentaries, vol. 3, star page 25, and volume 4, star page 368 et seq. It cannot reasonably be contended that the grantee of Logan or Brennen, either of the wheat or land, would not have the same rights as his grantor. There was no express agreement of partnership between Logan and Brennen, and the facts do not justify an inference of partnership. They were joint owners of the land, and each was interested in reaping the fruits of his investment; and, in order to get some returns from the land, Brennen farmed the land to wheat, and Logan paid him for his services. Each owned half of the wheat, and neither could sell the half which belonged to the other without his consent. This consent, however, Brennen had, and, in selling Logan's half of the wheat, he acted as his agent; and, were this a case where the defendant or Logan must suffer on account of some wrongful act of Brennen, of course, the loss would fall on Logan, but that is not the case. The defendant was in possession of such facts and circumstances as to charge it with knowledge of the arrangement between Logan and Brennen, but, even if it were not, the wheat actually belonged to Logan, and the defendant did not part with any valuable thing to get it; and it should be compelled to either pay for the wheat or return it, and, upon failure so to do, Logan could sue and recover its value. Goell v. Morse and others, 126 Mass. 480.

Under the facts in this case, the plaintiff ought to have recovered. The judgment of the lower court is hereby reversed, and judgment is hereby rendered for the plaintiff for $455.04, with interest at 7 per cent. thereon since October 15, 1901.

DONNELL v. HARSHE.

(Supreme Court of Missouri, 1877. 67 Mo. 170.)

NAPTON, J. The principal and decisive question in this case is the propriety of the following instruction given by the court: "The court instructs the jury that a copartnership is an agreement between two or more persons of sufficient capacity to contract to carry on a given business and share the profits of such business; and if the jury believe from the evidence in this case that there was either a verbal or written agreement between the plaintiff and Emeline Harshe, by which the former was to occupy and cultivate the farm of said Emeline Harshe for any given length of time, and that each was to receive a moiety or share of the crops raised or grown thereon under such agreement, then such farming was a copartnership business, and belongs to another adjustment, and must be settled or adjusted in a different form of action, and cannot be made available in this action; and if they find that the matters embraced in defendant's account were connected with or arose out of such business they will exclude all evidence of such account from their minds," etc. The evidence in the case is not stated in the bill of exceptions, but it is stated that evidence was offered tending to prove that plaintiff and defendant entered into an agreement by which plaintiff was to cultivate a farm of defendant, lying in St. Francis county, on shares; that plaintiff and defendant were each to defray one moiety of the expenses attending such cultivation of said farm, and were to share equally in the profits thereof. The instruction asserts, as a matter of law, that the occupancy and cultivation by one of the farm of another, under an agreement that the owner and occupant will divide crops raised in an agreed proportion, constitutes the owner and occupant copartners. This is probably a very common mode of leasing farms in this state, but the proprietor and occupant might be equally surprised to be informed that they were partners.

A definition of partnership, broad enough to embrace all cases and narrow enough to exclude such as ought to be excluded, has been found a very difficult and embarrassing task to those writers who have published books on the subject. The courts have been embarrassed, also, in nice refinements about partnerships inter se and partnerships which are only as to creditors. Indeed, Judge Story, after a prolonged examination of these distinctions, seems to conclude that the intention of the parties ought to be the controlling circumstance to determine their relations, and therefore, where the profits and losses are to be shared by the parties in fixed proportions, and, to use his language, "each is intended to be clothed with the powers and rights and duties and responsibilities of a principal, either as to the capital stock or the profits, or both, there may be a just ground

to assert, in the absence of all controlling stipulations and circumstances, that they entered a partnership." This, it will be perceived, is quite indefinite.

It is essential to a partnership that there be a community of interest in the subject of it, and this community of interest must not be that of mere joint tenants or tenants in common. When the effect of the agreement is, as propounded in the instruction, that one should occupy and cultivate the farm, and the crops should be divided equally between the occupant and the owner, no partnership is necessarily intended or created. In the case of Dry v. Boswell, 1 Cham. 329, where there was an agreement between the owner of a lighter and a lighterman that the lighterman should work the lighter, and the gross earnings should be equally divided between him and the owner, Lord Ellenborough held that this was only a mode of paying the lighterman for his wages, and was not a participation in profits and loss, and no partnership existed. So in Ambler v. Bradley, 6 Vt. 119, A. owned a sawmill and agreed with B. that the latter should work it and divide the gross earnings equally. They were held not to be partners. In Putnam v. Wise, 1 Hill (N.Y.) 234, 37 Am. Dec. 309, an agreement between the owner of a farm and the occupant that the latter should work it on shares, and a division be made of the gross earnings of the farm, was held not to be a partnership. In Dwinel v. Stone, 30 Me. 384, it was held that a mere participation in profit and loss does not necessarily constitute a partnership. "There must be," said Shipley, C. J., "such a community of interest as empowers each party to make contracts, incur liabilities, manage the whole business, and dispose of the whole property, a right which, upon the dissolution of the partnership by death of one, passes to the survivor, and not to the representatives of the deceased." In Caswell v. Districh, 15 Wend. (N. Y.) 379, the court held an agreement between landlord and tenant that the tenant should sow certain kinds of grain and yield a certain portion of each crop to the landlord made them tenants in common with the crops. In Denny v. Cabot, 6 Metc. (Mass.) 82, an agreement was made between H. and B., by which H. was to supply B. with stock to be manufactured into cloth at his mill, on H.'s account, and B. was to manufacture the stock into cloth and to deliver the cloth to H. at a certain sum per yard, and H. could pay him one-third part of the net profits of the business, and this was held not to make A. and B. partners. In Harrower v. Heath & Cole, 19 Barb. (N. Y.) 331, an agreement similar to the one to establish which proof was offered in the present case was held to constitute the owner and occupiers tenants in common, both of the farm and the crops. And in Johnson v. Hoffman, 53 Mo. 504, a similar contract was held to make the landlord and tenants merely tenants in common of the crops and not the farm. It is useless, however, to multiply authorities on this subject, as hardly any two cases are exactly alike,

and very slight shades of distinction lead to different conclusions. The instruction was erroneous, as we think, and the judgment must therefore be

Reversed.[1]

NOYES v. CUSHMAN et al.

(Supreme Court of Vermont, 1853. 25 Vt. 390.)

ISHAM, J. The auditors have reported a balance due the plaintiff, subject to objections which have been taken by the defendants.

It is insisted by the defendants that they were not partners when the services were rendered by the plaintiff, and that this joint action against them as such cannot be sustained. We learn from the report that the gristmill and privilege were at first purchased by the defendants, Cushman and Noyes, under an agreement to rebuild the same and share equally in its expense, and that afterwards one-sixth of the same was purchased of them by the defendant Morse under an agreement to be at a like proportion of the expense of rebuilding

[1] "It is sometimes difficult to determine whether a person who works the land of another on shares is a tenant in common of the crop with the owner of the land or a mere cropper. Much depends upon the wording of the contract between the parties. Lanyon v. Woodward, 55 Wis. 652, 13 N. W. 863; Carrier v. Atwood, 63 Wis. 301, 24 N. W. 82; Wood v. Noack, 84 Wis. 398, 54 N. W. 785; Rowlands v. Voechting, 115 Wis. 352, 91 N. W. 990; Warner v. Abbey, 112 Mass. 355. In the case at bar there is practically no dispute as to the facts. The plaintiff furnished the land and the seed. The defendant was to plow the ground, plant and care for and harvest the potatoes, and have one-half of what should be raised. After plowing the ground and planting the potatoes, the defendant moved away. Finally his son-in-law came and went over the potatoes with a cultivator one way and partly over them the other way. But the potatoes became badly damaged for want of care, and finally the plaintiff got another man to care for the potatoes, and agreed to give him a share of the crop for doing so. The defendant testified to the effect that the plaintiff was to furnish the land and the seed, and that he was to cultivate the ground and have half the crop, provided he stayed there; and if he did not stay, and no one else would buy, then the plaintiff would buy his share of the potatoes. The trial court manifestly held that the parties were tenants in common of the crop. If such was the relation of the parties, then the decision may be justified. Section 4257, St. 1898; Foley v. Land Co., 94 Wis. 329, 68 N. W. 994; Sullivan v. Sherry, 111 Wis. 476, 87 N. W. 471, 87 Am. St. Rep. 890; Orcutt v. Moore, 134 Mass. 48, 45 Am. Rep. 278. If, on the other hand, the defendant was a mere cropper, then the decision was wrong. The general rule is that: 'The legal possession to the land, as well as the title to the entire crop, is in the owner of the soil. The possession of the cropper being merely that of a servant, and incident to his right and duty of entering the close for the purpose of planting, cultivating, and gathering the crop, it is not the legal possession of the premises which usually gives the possessor the title to the produce. He has no property in his share of the crop until the division, which is made by the owner of the land.' 8 Am. & Eng. Ency. of Law (2d Ed.) 324, 325. It is said that 'the term "cropper" is applied to a person hired by the landowner to cultivate the land, receiving for his compensation a portion of the crop raised.' Id." Per Cassoday, C. J., in Kelly v. Rummerfield, 117 Wis. 620, 94 N. W. 649, 98 Am. St. Rep. 951 (1903).

and putting the mill in proper condition for improvement and use. These several purchases vested the title and interest in these premises in the defendants as tenants in common. Their mutual obligation to rebuild and repair does not necessarily constitute them partners, for, as observed by Judge Bronson in Porter v. McClure, 15 Wend. (N. Y.) 192, "they may or may not become partners in carrying on milling business." A mere community of interest in real or personal estate does not constitute a partnership. But where a purchase of that character is made, and the premises are rebuilt or repaired for the purpose of prosecuting some joint enterprise or adventure, and under an agreement to share in the profits and loss of the undertaking, the contract then becomes one constituting a partnership, and each member thereof is liable as a partner, and they are liable jointly for services performed in perfecting their joint undertaking.

The report of the auditors shows this to have been the character of the contract as made by these defendants. After having obtained a joint interest in the gristmill and privilege, they became obligated to rebuild and repair the same, for the purpose of prosecuting a joint undertaking in the use of this property for milling purposes; and the defendant Morse was to have one-sixth of the toll or profits of the mill and one-half of the remainder for taking charge of the same, and the other defendants, Cushman and Noyes, were to have the remaining shares. In this contract are found all the elements of a partnership even as between themselves, much more as to third persons; and whatever agreement may have been made as between themselves, as to the manner in which other persons were to be employed and paid, it can have no effect upon their liability to those who have rendered services in promoting their joint undertaking, particularly where, as in this case, the services were rendered under the understanding that the defendants were jointly liable therefor, and when the plaintiff was ignorant of any different arrangement as between the defendants. We think, therefore, the auditors came to a right conclusion that the defendants were liable as partners on this account to the plaintiff.

The result is that the judgment of the county court is affirmed.

QUACKENBUSH v. SAWYER.

(Supreme Court of California. 1880. 54 Cal. 439.)

McKEE, J. We do not regard the action in this case, as does counsel for the appellant, as an action for the settlement of a partnership account. In substance it is alleged, in the complaint in the case, that the parties had severally advanced certain sums of money in purchasing the "circus property" mentioned in the complaint; that they then entered into an agreement that the defendant should take and

keep possession of the property, and cause it to be used and employed by circus companies or managers for the joint benefit of himself and the plaintiff in equal shares; that in using or employing it for this purpose he should make provision that the "rent or compensation" receivable for the use of the property should be first paid to him; and that, upon collecting or receiving such rent or compensation," he should account therefor and pay it over every month to the plaintiff, until the money which plaintiff had advanced for the purchase of the property, and interest thereon from the time of its advancement, should be paid, and, after such payment, defendant should account for and pay over to the plaintiff one-half of said rent or compensation. And it is charged that the defendant received as "rent or compensation" for the use of the property large sums of money, of the amount of which plaintiff is ignorant, and he prays for an accounting and division of the property.

Each allegation of the complaint is specifically denied by the answer, and a special defense is also set up. The proofs on the trial establish these facts: That in June, 1873, one Conklin was owner of the "circus property" mentioned in the pleadings, and manager of a certain troupe or company of circus performers; that by a bill of sale Conklin transferred the property to the parties in this action as security for the payment to them of certain sums of money which they had severally advanced to him; that they agreed with each other that defendant should take possession of the property, and transport it from place to place in the state of California, upon a performing tour, and receive or collect the income of the performances and apply it, first of all, to the payment of money advanced by the plaintiff, and then to the payment of what he himself had advanced to Conklin.

Pursuant to this agreement, defendant took possession of the property, and, being a teamster, made a contract with Conklin for the transportation of the property, during the summer season of 1873, from place to place in the state of California, on a performing tour, under the direction of Conklin. Performances were given in various interior towns and cities of the state, at which the defendant collected or received $4,200; but he has failed and refused to account for or pay to the plaintiff any portion thereof. Upon these proofs the court below rendered judgment against the defendant for the amount of money advanced by the plaintiff to Conklin, and interest thereon from the date of its advancement. The bill of sale to the parties made them joint owners of the property. Heyland v. Badger, 35 Cal. 404. But a mere joint ownership in personal property does not constitute the owners partners. Post v. Kimberly, 9 Johns. (N. Y.) 470; Hawes v. Tillinghast, 1 Gray (Mass.) 289. Nor did the agreement between them have that effect. A partnership is the association of two or more persons for the purpose of carrying on business together, and dividing its profits between them. Section 2395, Civ. Code. But plaintiff and defendant were not engaged in the circus business, nor

did they agree to carry it on. The business belonged to Conklin alone; and in it the defendant used the joint property of himself and the plaintiff—as he was authorized to use it in the business of any other circus manager—upon the terms and conditions that he was to receive the income of the business from Conklin for the payment of their claims against Conklin. Only to the extent of the income, or, as the pleader calls it, "rent or compensation," receivable by the defendant, were they at all interested in the business; but an agreement to divide the income of a business does not create a partnership. Therefore, when the defendant received the income, he did not receive it as a partner, but as a trustee; and he held so much of it as was necessary to pay the plaintiff's demand against Conklin in trust for that purpose, and it was his duty to account for it to the plaintiff. Failing in that, the plaintiff had a right to compel him to account for so much of it as came into his hands for the purpose of discharging his trust.

Judgment affirmed.

EVERITT et al. v. CHAPMAN et al.

(Supreme Court of Connecticut, 1827. 6 Conn. 347.)

Action by the plaintiffs against Isaac Chapman and Russel Mott, surviving members of a partnership composed of the defendants and Henry R. Mott, engaged in the business of manufacturing leather, under the firm name of Chapman & Motts. By the partnership articles the parties agreed to unite for the purpose of carrying on a tannery. Chapman agreed to furnish his tannery and equipment for a fixed annual rental, to be paid one-half by him and one-half by the Motts, and to furnish one-half of the hides necessary to keep the tannery in operation and to receive and make market for one-half of the leather produced. The Motts agreed to furnish a similar quantity of hides and to market a similar quantity of leather, to take care of all the bark necessary to tan said stock, to do all the work of tanning for 4½ cents per pound of leather, and to pay one-half the expenses for keeping the tannery in repair. "All the said parties also agree to use their own credit separately, and not jointly, in purchasing anything; and no notes are to be given, only by each individual in his own name." The business was conducted by H. R. Mott, who ordered the hides in question from the plaintiffs in his own name. The plaintiffs were ignorant of any partnership when they furnished the hides and charged them to H. R. Mott. The hides were made into leather for the joint benefit of the defendants. Chapman, having furnished his proportion of the hides according to the partnership articles, denied his liability to the plaintiffs.

The judge charged the jury that upon the facts admitted the de-

fendant Chapman was liable as a partner for the value of these hides to the plaintiffs. The jury returned a verdict for the plaintiffs accordingly, and the defendants moved for a new trial on the ground of a misdirection.

Daggett, J. It was suggested, by the counsel for the defendants, though not pressed, that it should have been left to the jury to decide whether the defendant Chapman was a partner. Surely it was a question of law, and therefore within the province of the court to decide, whether by the articles recited and the facts admitted a partnership, which subjected the partners to this debt, existed. There being no fact in controversy, it was the undoubted duty of the judge to state to the jury whether the defendants were liable as partners.

It was further suggested that the plaintiffs trusted Henry R. Mott and charged the hides to him. Such is the fact, in every case, where the suit is brought against a dormant partner; yet, when he is discovered, he is rendered liable. This is familiar law, and hardly requires support from authorities. In Hoare et al. v. Dawes, 1 Doug. 371, Lord Mansfield said "that the law with respect to dormant partners is not disputed, viz., that they are liable when discovered." Indeed, it would be most unjust that a person really in partnership, and participating in the profits, should not be rendered liable for the debts of the partnership, merely because he chose to conceal himself, or because his partner, when buying goods for the use of the partnership, did not disclose his connection. Such a principle is not to be tolerated.

It was also suggested that the leather, when manufactured, was to be divided between the copartners; that is, the two Motts were to receive and sell one half, and Chapman the other. Be it so. The leather was to be divided into moieties in quantity and quality. Such is the clear meaning of the article. Is it not the same, then, if the whole leather was, by agreement, to be sold by either of the partners, or by an agent, and the avails divided? Where, then, is there room for a question in this case? The counsel for the defendants answer: Here is no copartnership in purchases for this establishment, because the Motts, by the articles, were to purchase one half the hides, and Chapman the other half; and neither of these parties were to use the credit of the other. This agreement might bind the parties. And it could not influence the present decision, if it were admitted, that it ought to affect third persons, dealers with either of the partners, if they were cognizant of the fact; but it is no part of the case that either the public at large, or these plaintiffs in particular, were acquainted with the stipulations in question. On the contrary, it is conceded in the motion for a new trial that the plaintiffs were ignorant of any copartnership at all. It is therefore to these plaintiffs a case of a dormant partner, discovered after the debt was contracted. And is it to be endured that a clause inserted in a private agreement between two or more partners, that one of the partners only should be liable

for the property purchased for the use and benefit of the whole, should bind third persons, ignorant of any partnership? The injustice of such a doctrine is too great to need animadversion. The case, then, under consideration presents a partnership between three persons, with an agreement between themselves substantially to share in profit and loss, but that in the purchase of one of the materials for the manufacture, viz., hides, two of them should, with their own funds or credit, purchase one half, and the third the other half. For hides, thus purchased for the tannery by either, I am satisfied all the partners are liable. It would be to depart from the spirit of all the decisions on this subject to decide otherwise.

The only case cited with confidence by the counsel for the defendants is that of Saville v. J. Robertson & J. Hutchinson, 4 Term Rep. 720. In that case it was decided that in an action against the defendants for goods sold and delivered, if it clearly appeared that no copartnership existed at the time of the contract to sell to one of them, any subsequent agreement between them to share in the profits of the goods, would not render them liable as partners. The court compared it to a case where several persons agree to enter into partnership, each to bring in a stipulated sum of money, and each borrowing his proportion of different persons, in which case the persons advancing the money could not maintain actions against all the partners for their several proportions lent to each. So in our courts it has been decided that where two agreed to build a vessel, one to furnish the materials and the other to do the work, and then to own it together, the building of the vessel was not a partnership concern. But Lord Kenyon, in giving his opinion in the case of Saville v. Robertson, above cited, says: "It is clear that if all these parties had been partners at the time when their goods were furnished, though that circumstance was not known to the plaintiff, they would all have been liable for the value of the goods." And Buller, in giving his opinion, says: "It is certainly true that if one partner order goods himself without disclosing the names of the other partners, and the goods be afterwards delivered to them all, they are all liable." And one of the judges (Ashhurst) thought it a case of partnership. This authority, then, is so far from justifying the defense that it vindicates the claim of the plaintiffs; for these defendants were in partnership when the hides were purchased, they were bought for the concern, they were delivered into their tannery, and they went to their joint benefit having been purchased by H. R. Mott, without disclosing the names of his copartners.

In Gouthwaite v. Duckworth, Brown and Powell, 12 East, 421, the facts were more like those in this case. That was an action for goods sold and delivered. There was an agreement in that case that Brown and Powell were to purchase goods for an adventure to Lisbon, which were to be shipped on board the Betsey, and to pay for the same, and the returns of such adventure were to be made to Duckworth, and to go in liquidation of his demands on Brown and Powell. Brown and

Powell purchased goods of the plaintiff; but Duckworth was not known in the purchase, nor did he authorize the purchase on account of the three, who were to share in the profits and loss. Duckworth, in his own name, purchased and paid for goods sent out at the same time. Brown and Powell were to share in the profit and loss of these goods. They were all consigned to Barlow, who acted as the agent of all the defendants. The whole Court of King's Bench adjudged this to be a partnership transaction, and held the defendants jointly liable.

I think the court are warranted, from a view of all the cases and the general principles of law on this subject, to declare the purchase of these hides to be for the defendants and said H. R. Mott; that, had a loss been sustained in the hides, it must have been borne by the three, and any profit shared in like manner; that the stipulation respecting the individual purchases of hides cannot affect creditors, who furnished this joint fund; and, therefore, that the charge was correct, the verdict right, and, of course, that no new trial ought to be granted. The other judges were of the same opinion, except Brainard, J., who was absent.

New trial not to be granted.[1]

BRUCE v. HASTINGS.

(Supreme Court of Vermont, 1867. 41 Vt. 380, 98 Am. Dec. 592.)

Assumpsit. Plea, the general issue. Trial by jury, June term, 1867; Steele, J., presiding. On trial it appeared that the plaintiff's claim was for one-half the profits which accrued from the purchase and sale of a farm, stock, and produce. The plaintiff testified that the defendant had obtained the refusal of the farm, stock, and produce of one Nelson at a price named, and proposed to him, the plaintiff, to complete the trade, if the plaintiff would enter into the speculation with him; that their plan of operations was to buy the property, and then sell the real estate in parcels and the personal property at auction, or to sell the whole in some manner which they should find advisable, so as to clear the matter up in a short time; that the plaintiff accepted

1 "When two or more persons employ a common stock, whether consisting of property, or mere labor and skill, in a common undertaking, with a view to a common profit, they are partners. It is not necessary that there should be a community of interest in the property that produces the profits, or a community of losses, or an equality of profits; but a community of profits is essential to a complete partnership, and where there is no express stipulation to the contrary the law presumes that the losses are to be shared in proportion to profits. In contemplation of law the profits of a partnership consist of the surplus realized from a business, after the debts and losses are adjusted. One partner may expressly stipulate that he is not to share in losses, and such an agreement will be valid between the parties; but he cannot thus withdraw himself from his obligation as a partner to strangers." Per Dick, J., in Oppenheimer v. Clemmons (C. C.) 18 Fed. 886 (1883).

the proposition, and that he and the defendant bought the property of Nelson in accordance with the refusal the defendant had obtained, but took no deed; that, as they sold the real estate to different parties, Nelson deeded directly to these parties, and the most of the personal property was sold at auction in Nelson's name; that the profits of the enterprise were over $1,000; and that by the agreement the plaintiff was to have one-half of the sum so cleared, and the defendant had that amount of money which belonged to him, the plaintiff. The defendant denied any such agreement. The original bargain with Nelson was made by the defendant before he had any talk with the plaintiff, and Nelson was not informed by the defendant that any one besides the defendant was to be interested in the trade. The original bargain was merely a refusal of the property at a price named. The refusal was evidenced by a written bond or contract, which was not produced. There was no written agreement of any kind between the plaintiff and the defendant. The plaintiff claimed that, after the defendant closed the trade in accordance with the refusal, Nelson asked him, the plaintiff, if he was interested in the trade, and he told him he was. The plaintiff testified that he was to share equally with the defendant; that nothing was said about losses, but if there had been a loss he did not know why he should not have had to share it; that if there had been a loss he should have paid one-half of it. Belden testified that Bruce, the plaintiff, told him before the auction that he "was jointly interested" with the defendant. The court rendered judgment that the plaintiff become nonsuit, to which the plaintiff excepted.

WILSON, J. This is an action of assumpsit to recover one-half the profits which accrued from the purchase and sale of a farm, stock, and produce. The defendant insists that the action involves the settlement of partnership transactions, and should be account, instead of assumpsit. * * * The question is whether the action of assumpsit will lie upon the agreement under which the plaintiff claims to recover. As a general rule, the action of assumpsit cannot be sustained by one partner against his copartner in respect to any matter connected with the partnership transactions or which involved the consideration of their partnership dealings. Chitty on Contracts, 269. But we think a partnership does not arise on the agreement which the evidence tends to show was made between these parties. The defendant, in his own name and upon his own individual credit, bargained with Nelson for the property, but took no deed of it. The defendant sold the real estate to different parties, and Nelson, by direction of the defendant, deeded it directly to those parties. The most of the personal property was sold in Nelson's name by direction of the defendant. It does not appear that the title to the real estate ever vested in either of these parties. It would seem that, if the plaintiff acquired any interest in or title to the personal property, he held as a tenant in common with the defendant, and not as a partner. It was

not an agreement to put in capital and labor for the purpose of trade generally; but the agreement, as shown by the evidence, was limited to a single specific purchase by the defendant, with the understanding that the property should be sold as soon as a purchaser could be found, and that the defendant would give the plaintiff one-half that should be made in the enterprise, in consideration of his agreement to aid and assist the defendant in carrying out his contract with Nelson. The form of the contract has very much the appearance of being a mode of determining the plaintiff's compensation for the assistance which he contributed to the defendant in the purchase and sale of the property. But, treating the parties as tenants in common, there can be no serious objection to adjusting the plaintiff's claim in this form of action under the circumstances of the case. We have before remarked that the contract contemplated a single specific purchase of property and sale of it. It has been sold and disposed of according to the understanding and to the satisfaction of both parties. It was the duty of the defendant to pay Nelson the contract price for the property. He did pay him, and the defendant had in his hands nearly $1,000, profits of the enterprise. Neither party had any right, under the agreement, to appropriate the profits of the enterprise for the purpose of further trade on their joint account. Their relation, as tenants in common of the specific property purchased, was at an end when the property was sold in pursuance of the agreement of the parties. If the defendant made such contract as the testimony tends to show he did make, he is indebted to the plaintiff for one-half the profits after deducting the expenses of selling the property; and the defendant is not holding the money as a credit, to be balanced in whole or in part by other money or property received by the plaintiff from the enterprise. The adjustment of the plaintiff's claim involves no accounting as to any matter or dealing except what relates to the specific property purchased and sold under the contract, from which the profits in question accrued. It is conceded by the defendant that the whole proceeds of the sales, including the profits, passed into his hands or were paid out for his benefit, and that the plaintiff has never received any part of the property, or avails of it. Hence the reason of the rule, that "it would be useless for one tenant in common to recover what, upon taking a general account, he might be liable to refund," is not applicable to the facts of this case. We are agreed that the remedy may be assumpsit under the circumstances of this case. * * *

The judgment of the county court is reversed, and the cause is remanded for trial.

McMURTRIE v. GUILER et al.

(Supreme Judicial Court of Massachusetts, 1903. 183 Mass. 451, 67 N. E. 358.)

Suit by Lawrence H. McMurtrie against James Guiler and another. There were rulings adverse to defendants, and they bring exceptions.

BRALEY, J. This case is before us on a bill of exceptions instead of by appeal with a report of the evidence, and the principal question presented for decision is whether there was any evidence to support the finding that, as between themselves, the parties were partners. While there was some slight difference as to details in the testimony of the plaintiff, enough appeared to show that he was at work on a salary for the defendants, who were contracting and mechanical engineers, when, in consequence of a more advantageous offer which he had received, to induce him to remain with them, they proposed to admit him as a member of the firm. No written articles of partnership were prepared, but it was understood and agreed between them that the plaintiff should receive from the profits of the business at least $2,400, and probably enough more to make the sum of $5,000, as his share for one year. He then ceased to work on a salary, but apparently drew $200 a month during the time, and at the close of the fiscal year, a dispute having arisen as to his relation to the defendants, he left the firm, claiming at least one-quarter part as his share of the profits. After the proposition had been made to and accepted by him, he was introduced as a partner, and his name so appeared on the stationery and business cards of the firm. No fractional proportion of the profits which the plaintiff was to receive as his share seems to have been fixed, and, while various suggestions were discussed, it was finally left unsettled. While in substance the evidence of the defendants tended to show that they understood the arrangement to be that the plaintiff was to share in the business of the firm only by way of compensation, and that there was no understanding that he was to be admitted as a member, it appeared that one of them had as a witness in another case stated to the contrary, and had testified that the plaintiff was his partner. On the whole evidence one of two results may be reached—either that the plaintiff was interested in the business as a member of the firm, or that he was at work for the defendants under an agreement that his compensation was to be a share in the profits; and the judge before whom the case was tried found in favor of the plaintiff's contention.

As between themselves and creditors, having represented that they were partners, and held themselves out as such, they would be estopped to deny the fact; but in this case no such question arises, and, in order to determine their relation to each other, their intention must control. If no general definition of the contract of partnership to fit all cases can be given, and each case as it arises must be decided on the facts presented, there seems to be an agreement of the authorities

that where persons associate themselves together to carry on a joint business for their common benefit, to which each contributes either property or services, and the profits arising therefrom are to be shared between them, the essential elements of a contract of partnership are made out. Ryder v. Wilcox, 103 Mass. 24; Somerby v. Buntin, 118 Mass. 279, 19 Am. Rep. 459; Meehan v. Valentine, 145 U. S. 611, 618, 12 Sup. Ct. 972, 36 L. Ed. 835; Pooley v. Driver, L. R. 5 Ch. Div. 458, 471. While the firm was not a commercial partnership, and it does not appear what property, if any, outside the partnership accounts and profits, was owned by them, a community of interest in the profits as such by the plaintiff was sufficient to establish the relation and to entitle him to a decree. Howe v. Howe, 99 Mass. 71. There was enough to show that a going business enterprise was in existence, to which, by mutual consent, the plaintiff was admitted. He, in common with the defendants, contributed his services as a contracting and mechanical engineer, and with them was to share in the profits of their joint undertaking; and this is all that is necessary, as matter of law, to sustain the finding.

But the defendant contends that, in case there was no agreement as to the proportion in which the parties were to share the profits, the contract is not complete, and there being, therefore, no way of ascertaining the plaintiff's share, he cannot prevail. We are not prepared to hold that, because it was left undetermined by their agreement what share the plaintiff was to take in the profits, a court of chancery must dismiss his bill, and allow the defendants to hold the result of his labor and skill for their exclusive benefit. Where the contract is silent, equity will adjust the rights of the partners to profits on the basis of what their intention was as shown from all the facts of the case. Whitcomb v. Converse, 119 Mass. 38, 42, 20 Am. Rep. 311; Harris v. Carter, 147 Mass. 313, 17 N. E. 649; Winchester v. Glazier, 152 Mass. 316, 325, 25 N. E. 728, 9 L. R. A. 424. The plaintiff might well have claimed one-third of the profits, and, if the defendants sought to cut down this claim, and to overcome any presumption arising from the partnership relation by evidence of a different understanding originally, or to be gathered from the course of dealing between them, they could not be heard to deny to the plaintiff the equity of sharing in the profits while seeking on their part to limit the extent of his interest at less than one-third, because to allow him to participate to that amount would be unjust to themselves. Seeking equity for their protection, they must do equity to him. But the agreement finally made by the parties at the trial fixed the amount the plaintiff was to recover if found entitled to relief, and the finding followed the agreement. * * *

Exceptions overruled.

FECHTELER et al. v. PALM BROS. & CO.

(Circuit Court of Appeals of the United States, 1904. 133 Fed. 462, 66 C. C. A. 336.)

Bill to obtain an accounting under a contract between the complainants, comprising a firm engaged in business in the city of New York, under the name of Palm, Fechteler & Co., and the defendant, a corporation of Ohio, doing business at Cincinnati, under the corporate name of Palm Bros. & Co. The contract provided in substance the following: The plaintiffs agreed to supply at actual cost all goods in the plaintiffs' line which defendant should select, and to pay to the defendant a sum of money equal to 36 per cent. of the total and entire gross profits made each year in the plaintiff's business. Plaintiffs further agreed to employ at least $100,000 in their business during the life of the contract. The defendant agreed to supply at actual cost all goods in defendant's line which plaintiffs should select, and to pay to plaintiffs a sum of money equal to 64 per cent. of the total and entire gross profits made each year in the defendant's business. The plaintiffs and defendant were engaged in the same line of business. The agreement was to continue 12 years, and settlements were to be made annually.

LURTON, Circuit Judge. * * * But does the contract in suit actually create the relation of partners between the complainants and the defendant corporation, assuming the corporation to have the power to enter into such relation? The question here presented is not whether the nature of the agreement is such that liability as a partner might exist as to third persons, but whether this contract provides for an actual partnership.

The defendant has repudiated the contract, and defends, when sued, upon the ground that it had no power to enter into a partnership agreement. To make good this defense, it must show that the contract is one for a partnership—an actual partnership—and it will not do to say that, although no actual partnership was intended or existed, it is enough to show that third persons might hold both complainants and defendants liable as partners, although in fact no such relation existed. Liability as a partner to third persons misled by appearances may sometimes arise, though no actual partnership exists. But this rests upon the doctrine of estoppel. Partnership is a fact—a fact sometimes made out, like other facts, from circumstances, as well as by direct evidence. Evidence may raise a presumption of a partnership so strong as to be conclusive when third persons are involved. And this is the case when one has held himself out as a partner to one ignorant of the actual fact. But this case presents no such question, as the rights of third persons are not involved. Indeed, it would be difficult to imagine a case of liability to third persons upon the ground of holding out, when the supposititious partnership was with a corporation incapable, as

matter of law, of entering into such a relation. If the contract sued upon is not one which deprives the stockholders of the corporation of their power and duty to manage the corporate affairs, or subjects the corporation to the domination incident to the affairs of a copartnership, it is not ultra vires. It devolves, therefore, upon the defendant to establish that the contract into which it has entered is, in substance and legal effect, one of partnership.

It is not very prudent to define a partnership. Many definitions have been attempted, and Sir George Jessell, Master of the Rolls, in Pooley v. Driver, L. R. 5 Ch. Div. 458, 471, referred to the fact that no less than fifteen such definitions by different learned lawyers, no two of which he says agree, are given in the third edition of Lindley on Partnership, pp. 2, 3. Concerning these he says, "And I suppose anybody, by reading the fifteen, may get a general notion of what a partnership means."

The Supreme Court, in Meehan v. Valentine, 145 U. S. 611, 618, 12 Sup. Ct. 972, 973, 36 L. Ed. 835, has, through Mr. Justice Gray, defined a partnership. The very learned justice in that case said:

"The requisites of a partnership are that the parties must have joined together to carry on a trade or adventure for their common benefit, each contributing property or services, and having a community of interest in the profits."

All would possibly not agree that the contribution by each of "property or service" is essential.

Sir George Jessell, in Pooley v. Driver, cited above, states that under English law you can have a partner, a dormant partner, "who puts nothing in—neither capital nor skill, nor anything else."

Undoubtedly, there must be an association of two or more persons for the purpose of carrying on a trade or business or adventure together and dividing the profits. The presence or absence of certain other incidents of a partnership by special arrangement between the parties would not seem to be of the essence of the matter. Fleming v. Lay, 109 Fed. 952, 955, 48 C. C. A. 748.

There is found in some of the earlier cases a disposition to regard evidence of a participation in profits as affording so cogent a presumption of a partnership as to make one liable to third persons, though ignorant of the fact, in defiance of the positive agreement of the parties that they should not be partners. Grace v. Smith, 2 W. Bl. 998; Waugh v. Carver, 2 H. Bl. 235; Berthold v. Goldsmith, 24 How. (U. S.) 536, 542, 16 L. Ed. 762; Wood v. Vallette, 7 Ohio St. 172.

This rule—that by operation of law one was liable as a partner to third persons, irrespective of the actual agreement between the parties, or of any misleading, seems to have been rested upon the theory that one who shares in the profits must also share in the losses and stand liable for the debts. The reason given in Waugh v. Carver, 2 H. Bl. 235, for this, is that in taking part of the profits he takes a part of the fund

which the creditor relies upon for payment. This reasoning has been repeated in many cases following Waugh v. Carver. But as Judge Story observes, this reasoning is utterly fallacious, inasmuch as profits do not exist until creditors are paid or provided for, as well as because creditors rely upon the entire assets, and not the net profits. Story, Part. § 36, and note 3.

If the presumption arising from evidence of a participation in profits had been as rigid as some of the judges have supposed, it was possible from that circumstance alone to fasten liability in the face of other evidence showing that in actual fact no partnership existed. But as this doctrine was based only upon a presumption of the fact of partnership from evidence of a participation in profits, it has never been regarded as an irrebuttable presumption, and its cogency as evidence of a partnership has been much relaxed by subsequent cases in which a wider view of the subject has been taken. The most that can be said of it, as the law is now understood, is that a participation in profits is strong evidence of a partnership, and enough, unless explained by other circumstances showing a different relation. Cox v. Hickman, 8 H. L. Cases, 268, 304, 306, 312, 313; March & Co. v. Court of Wards, L. R. 4 P. C. 419, 435; In re Eng. & Irish Soc., 1 Hem. & Mil. 85; Ross v. Perkins, L. R. 20 Eq. 331, 335; Pooley v. Driver, L. R. 5 Ch. Div. 458, 476, 479.

While the reference to agency as a test of partnership has not been accepted with much favor by the courts of either England or the United States, inasmuch as an agency is a consequence, and not a cause, of partnership, made so prominent in Cox v. Hickman, the case has otherwise met with general approval as a more reasonable statement of the inferences deducible from evidence of a participation in profits. Davis v. Patrick, 122 U. S. 138, 151, 7 Sup. Ct. 1102, 30 L. Ed. 1090; Story on Partnership, §§ 38, 49, notes; Meehan v. Valentine, 145 U. S. 611, 620, 623, 12 Sup. Ct. 972, 36 L. Ed. 835; Harvey v. Childs, 28 Ohio St. 319, 22 Am. Rep. 387.

If participation in profits is only evidence of a partnership, and subject to be explained even as to third persons, it must follow that the intent and agreement of the parties themselves should govern in all cases, and that the same rule should apply in favor of third persons, unless there has been conduct calculated to deceive, which applies between the parties themselves. * * *

The intent to be partners is made out when we find a business carried on for the joint benefit of two or more persons, with an agreement for a mutual participation in profits, as profits. The fact that one of the incidents of a partnership—mutual liability for debts—has been eliminated by agreement does not change the essential nature of the relation, which is nevertheless that of a partnership. Fleming v. Lay, 109 Fed. 952, 955, 956, 48 C. C. A. 748. Such a stipulation, though good between the parties, will not be valid as against third persons. This view reconciles the inconsistency of holding that a partnership

exists in defiance of the agreement and intention of the parties, as exhibited in some of the cases which seem to sanction the notion that there may be a partnership as to third persons, though there had been no conduct to create an estoppel, and none between the parties themselves.

But in every phase of the question as to the cogency of evidence of a participation in profits it has been understood that the person sought to be charged as a partner must have an interest in profits, as profits. Thus it is said by Judge Story in section 49 of his work upon Partnership, adopting the view of Collier upon Partnerships, "that in order to constitute a communion of profits between the parties, which shall make them partners, the interest in the profits must be mutual; that is, each person must have a specific interest in the profits as a principal trader." Meehan v. Valentine, 145 U. S. 611, 619, 623, 12 Sup. Ct. 972, 36 L. Ed. 835. Hence it always has been the rule that if you could show that the participation in profits was not a sharing in profits as a principal—in profits as profits of a joint business—but under an agreement by which a sum was to be received which should be equal to a definite proportion of the profits as a compensation for services or rent, or money advanced as a loan, there will be no liability as a partner. Such an arrangement would contradict the notion of a partnership, for there would be no participation in profits as a principal, no receipt of profits as profits. Upon the contrary, the relation of creditor would be made out; the amount of the debt being a sum of money estimated by a certain proportion of the profits, as a mere measure or yardstick. "The way in which the profits are to be participated in is the essence of the whole matter." Cotton, L. J., in Ex parte Tennant, 6 Ch. Div. 303, 316. This definition of sharing in profits as evidence of a partnership is supported by all the cases, and we need cite but a few of the more recent and controlling: Berthold v. Goldsmith, 24 How. (U. S.) 536, 542, 543, 16 L. Ed. 762; Meehan v. Valentine, 145 U. S. 611, 619, 12 Sup. Ct. 972, 36 L. Ed. 835; Story, Part. §§ 33, 34; Burnett v. Snyder, 81 N. Y. 550, 37 Am. Rep. 527.

Applying these principles, the case at bar is of easy solution. The contract in suit does not in terms provide for a partnership, nor contemplate any of the incidents of a partnership, unless the provision in reference to the participation of each in the profits of the business of the other establishes the relation and liability of partners. But it is very clear that the provision for a participation in profits does not contemplate any sharing in profits as a principal or division of profits, as profits. "Profit" implies, without more, the gain resulting from the employment of capital—the excess of receipts over expenditure. Black's Law Dictionary, citing Connolly v. Davidson, 15 Minn. 519, 530 (Gil. 428), 2 Am. Rep. 154; Story on Part. § 36, note 3.

The old cases drew a distinction between net profits and gross profits. In discussing the kind of participation in profits which operated to create the relation of partners, it is said that:

"The true meaning of the language, an 'interest in profits, as profits,' seems to be that the party is to participate, indirectly at least, in the losses, as well as in the profits, or, in other words, that he is to share in the net profits, and not in the gross profits. If he is to share in the net profits, which supposes him to have a participation of profit and loss, that will constitute him a partner; if in the gross profits, then it will be otherwise." Story on Part. §§ 34, 42, and cases cited.

Under the contract in suit, the sharing was to be not in the net gains or profits made by the one party in the business carried on by the other, but in the gross profits. That net profits were not meant, they make plain by a definition found in the fifth paragraph, where it is stated, in substance, that "gross profit" means the aggregate sales made, whether collected or not, after deducting the cost, import duties, and carriage, and that "no other charges, expenses or losses of whatever kind or nature shall be deducted from said gross profits." Thus the participation was in the gross amount of sales after the deductions above mentioned were made. The losses in bad debts and the cost of business might consume the margin between the cost and sale price, and yet the complainants would be entitled to receive a certain per cent. of the gross profit, though the business had made no actual gains, or had even made a loss. There was, then, no sharing in losses, and, under the old cases, no participation in profits, as profits, such as would, without more, raise a presumption of partnership. * * *

Thus, though there is to be a sharing in gross profits, it is not to be a participation in profits, as profits, or as a principal in trade. Upon the contrary, the plain purpose is that each, in consideration of the privilege of picking and choosing the goods or designs made or imported by the other, agrees to pay the actual cost of such goods so selected and furnished, and also "to pay" the other at the end of each year "a sum of money equal to" a definite per cent. of the entire gross sales of the party making the payment, less only the actual cost and carriage of such goods. It is an agreement to pay, not to divide as principals would do, but to pay a sum of money "equal to" (that is, measured or estimated by) a certain proportion of the gross profits. It is evident from these considerations that the character in which the one party would receive a proportion of the gross profit realized from the business of the other would be that of a creditor, rather than that of a principal trader.

Unsupported as the claim of a partnership is by any provision giving either party the slightest control of the business of the other, or any indication that the plan is a mere scheme or device to carry on trade as partners without subjecting themselves to the incidents and liabilities of such an arrangement, we can but reach the conclusion that the learned judge below erred in the view he took of the contract. * * *

Decree dismissing the bill reversed, with directions to remand for an answer.

McDONALD BROS. v. CAMPBELL & BERGESON.

(Supreme Court of Minnesota, 1905. 96 Minn. 87, 104 N. W. 760.)

Elliott, J. The action was brought against the defendants as partners to recover the unpaid balance of an account for merchandise sold and delivered to the firm of Campbell & Bergeson. The only issue of fact at the trial was whether the defendant Emily P. Campbell was a member of the firm, and upon this issue the trial court found in favor of the plaintiffs. From an order denying a motion for a new trial, the defendant Emily P. Campbell appeals to this court.

2. The evidence tending to establish the existence of a partnership between Bergeson and Mrs. Campbell was not very satisfactory; but it was sufficient to convince the trial court, and we find no reason for disturbing its conclusion. The witness Rudd, who appears to have been entirely fair and disinterested, testified that he called upon Emily P. Campbell at her residence as the representative of a commercial agency for the purpose of obtaining information about the financial condition of the firm of Campbell & Bergeson, and that in answer to his inquiry Mrs. Campbell stated that she was furnishing the capital to carry on the business and was personally responsible for all the debts of the firm. Mr. Campbell testified that he was the member of the firm, and that his wife at no time had any connection with the business. But it appeared that on March 3, 1904, he had made a statement of assets and liabilities on behalf of the firm, to which he signed the name of his wife as a member of the firm. The witness Rudd testified that he had this statement in his possession, but he was not able to say whether he had ever exhibited it to Mrs. Campbell. It was, therefore, not competent evidence to charge Mrs. Campbell as a partner. McNamara v. Eustis, 46 Minn. 311, 48 N. W. 1123. But it may have very materially affected the value of Mr. Campbell's statement at the trial that his wife had never been a member of the firm. The court believed the testimony of Rudd, and was of the opinion that his evidence, when taken in connection with the conditions and circumstances, was sufficient to show that Mrs. Campbell was a member of the firm.

It was necessary for the plaintiffs to establish the relation of partners as a fact, because there is no element of estoppel in the case. The witness Rudd did not represent the plaintiffs, and there is no evidence to show that the statement made to him by Mrs. Campbell was ever communicated to the plaintiffs. Accepting the facts as found by the trial court, we think the conclusion fairly follows that Mrs. Campbell was a member of the firm. Partnership is a contractual relation existing between persons who have combined their property, labor, and skill in an enterprise or business as principals for the purpose of joint profit. Baldwin v. Eddy, 64 Minn. 425, 67 N. W. 349; Meehan v. Valentine, 145 U. S. 611, 623, 12 Sup. Ct. 972, 36 L.

Ed. 835 (Gray, J.). It exists when there is a community of interests in the whole property, business, and responsibility of the concern. It is true that some of the ordinary indicia of partnership are not disclosed by the evidence in this case. An admission by a party that he is a member of a firm is sufficient to bind him as such. Boosalis v. Stevenson, 62 Minn. 193, 64 N. W. 380. Such an admission is shown by this evidence. Mrs. Campbell was to furnish the capital and be responsible for the losses, and the fair inference is that she was to participate in the profits. The question of partnership or no partnership is not to be determined by any arbitrary formula. In some of the early cases in this court the rule then generally prevailing was adopted, and the agreement to share profits was said to be a conclusive test of the existence of a partnership. Fay v. Davidson, 13 Minn. 523 (Gil. 491); Wright v. Davidson, 13 Minn. 449 (Gil. 415); Connolly v. Davidson, 15 Minn. 519 (Gil. 428), 2 Am Rep. 154; Warner v. Myrick, 16 Minn. 91 (Gil. 81). But, according to the modern doctrine, even an agreement to participate in profits is not conclusive evidence of a partnership. As said by Mr. Justice Cooley, in Beecher v. Bush, 45 Mich. 188, 7 N. W. 785, 40 Am. Rep. 465: "So far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischievous." The gradual abandonment of the idea that such arbitrary tests exist may be traced from Grace v. Smith, 3 W. Bl. 999, through Waugh v. Carver, 2 H. Bl. 235, 2 Smith, L. C. (9th Ed.) 1178, to the celebrated case of Cox v. Hickman, 8 H. L. Cas. 268, which established the rule that even persons who share profits do not incur the liabilities of partners, unless the business is carried on by themselves personally or by others as their real or ostensible agents. Cox v. Hickman has been generally followed in this country. See authorities cited in note to George, Partn. 143.

The question of partnership depends upon the consent and intention of the parties, and this intention must be ascertained from the whole evidence and all the circumstances of the case. Bates, Partn. vol. 1, § 15 et seq.; Shumaker, Partn. § 31, and the cases there cited. But, where a partnership is the legal result of the agreement actually made, parties are partners, even though they have stipulated that they are not to be partners. "The intention is ascertained from the whole contract, from the actual result it creates, and not from the fact that the parties denominated it a partnership or may declare a partnership is not intended." Bestor v. Barker, 106 Ala. 250, 17 South. 389; Anderson v. Newbigging, L. R. 13 App. Cas. 316. In Badeley v. Consolidated Bank, 38 Ch. Div. 238, Lord Justice Lindley said: "I take it that it is quite plain now, ever since Cox v. Hickman, that what we have to get at is the real agreement between the parties." In the same case Lord Justice Bowen said: "To my mind the true test of partnership has been settled by the House of Lords and by

court after court in a way which leaves it no longer open to discussion. The real test is that which is decided by a catena of cases, beginning with Cox v. Hickman and ending, I hope, with this case, though I am not sure of that. The question is whether there is a joint business, or whether the parties are carrying on business as principals and agents for each other. * * * The right way is to weigh the facts separately and together, and to draw your conclusions." See Ames, Cases on Partnership, 124, note.

It thus appears that no one fact or circumstance can be taken as the conclusive test by which to determine the question of partnership or no partnership. All that is necessary is that there be competent evidence to show that the parties have entered into a contractual relation by which they have combined their property, labor, and skill in an enterprise as principals for the purpose of joint profits. * * *

The order appealed from is affirmed.

SECTION 4.—RELATIONS DISTINGUISHABLE FROM PARTNERSHIP.

NELSON, J., IN COSTER v. LORILLARD.

(Supreme Court of New York, 1835. 14 Wend. 336.)

At common law, an estate in joint tenancy, says Sir W. Blackstone, is where lands or tenements are granted to two or more persons to hold in fee simple, fee tail, for life, for years, or at will. In consequence of such grants, an estate is called an estate in joint tenancy, which signifies a union or conjunction of interest. Each joint tenant has the entire possession of every parcel and of the whole; and this union and entirety of interest and possession has given rise to the principal incident to the estate, which is the right of survivorship. The interest being not only equal or similar, but also one and the same, on the death of his companion the sole interest in the whole remains to the survivor. 2 Black. Com. 82 to 187; 1 Co. Litt. 840, 845; 2 Cruise, 503, 4. Tenants in common are such as hold by several and distinct titles, but by unity of possession, because none knows his own severally, and therefore they all occupy promiscuously. Lord Coke draws the true distinction between these estates in his Commentaries on Littleton. The essential difference, he says, between joint tenants and tenants in common, is that joint tenants have the land by one joint title and in one right, and tenants in common by several titles, or by one title and several rights, which is the reason joint tenants have one joint freehold, and tenants in common have several freeholds. 1 Co. Litt. 875. In the more brief language of Mr. Preston,

joint tenants have one estate in the whole and no estate in any particular part. Tenants in common have several and distinct estates in their respective parts. Preston on Estates, 137.

HELME v. SMITH.

(Court of Common Pleas, 1831. 7 Bing. 709.)

This was an action by the plaintiff, as part owner and managing owner of the ship Brailsford, against the defendant, another part owner of the same ship, for his portion of the balance due to the plaintiff for the outfit of the ship for several voyages.

The cause having been referred to arbitration, the arbitrator found specially as follows:

That the plaintiff was part owner of the ship Brailsford, and acted as ship's husband thereof during the several voyages in respect of which the claim in this action was made; that the defendant was also owner of one-fourth of the said ship, and interested to the extent of one-fourth in all the said voyages; and that the dealing between the plaintiff and defendant in respect of which this action was brought was upon the footing of the defendant being owner of one-fourth, and interested as aforesaid. He then awarded and adjudged:

That the said plaintiff do recover against the defendant in the action the sum of £162 8s. 6d., being the balance due at the time of the commencement of the suit from the defendant as such owner of one-fourth part of the ship Brailsford to the plaintiff as such part owner thereof, for the share of the defendant of the expenses incurred and paid by the plaintiff as managing owner or ship's husband as aforesaid, for the outfit of the said ship for four several voyages, being the voyages aforesaid, while the defendant was such part owner and interested as aforesaid. No account having been stated or settled between the parties, no express contract to account having been proved before the arbitrator, but all the voyages having been concluded, and the ship sold as thereafter mentioned before this action was brought, if the court should be of opinion that an action was not maintainable by one part owner against another for the cause and under the circumstances aforesaid, then he awarded that the verdict for the plaintiff should be set aside, and a nonsuit entered in lieu thereof. A rule nisi was obtained to enter up judgment for plaintiff, pursuant to the award.

Tindal, C. J. On looking at this award, two questions arise: One, whether an action will lie by one part owner of a ship against another for his share of the expenses of outfit; the other, whether the defendant, being in point of fact owner of a fourth, is liable to the expenses in that proportion, although legally entitled to no more

than an eighth. And there seems to be no reason for depriving the plaintiff of the full benefit of the award.

If, indeed, the plaintiff and defendant were partners, there is an end of the question; but part owners of a ship are not necessarily partners. If the parties had laid out money on a speculation in goods, the proceeds to be divided on the ship's return, they would have been partners in every sense; but there is nothing here to show that they were more than part owners, and the question is whether, if one lays out money to enable the ship to proceed, he may not sue each of the owners for his share of the expense. There is nothing to show that the plaintiff's claim was to depend on the profits of the voyage, or that he was to be deprived of remuneration if the voyage turned out to be without profit. The outfit was a portion of the capital which each was to advance, and, if the plaintiff had lent either of the part owners the capital he was to contribute, that would clearly have formed the ground of a separate claim. It might have been otherwise if by the course of trade it were the custom for a ship's husband to look to the returns of the ship for the payment of his bill; but no such custom is stated on the award, nor anything to show that the plaintiff and defendant were partners.

With respect to the second question, it is true that neither at law nor equity can an owner of a vessel claim any other interest than that which appears on the registry; but, if a party holds himself out and deals as owner of a fourth, he is liable to others on that proportion. Rule absolute.

THE QUEEN v. ROBSON.

(Crown Cases Reserved, 1885. L. R. 16 Q. B. Div. 137.)

The prisoner was tried and convicted at the Autumn Assizes for the county of Northumberland on the 31st of October, 1885, on an indictment framed under St. 31 & 32 Vict. c. 116, § 1, charging that he, being a member of a copartnership called the Bedlington Colliery Young Men's Christian Association (hereafter called the "association"), feloniously did in January, March, and May, 1885, embezzle three several sums of money of and belonging to the said copartnership.

The object of the association was, to use the language of one of its printed rules, "the extension of the kingdom of the Lord Jesus Christ among young men and the development of their spiritual life and mental powers." It was composed of members and associates. The number of members did not exceed 20. Any person was eligible for membership "who gave decided evidence of his conversion to God"; but before he could become a member he must be proposed and seconded by two members of the association and elected by the committee, on their being satisfied as to his suitability. Trustees for

the time being, in whom the real property belonging to the association was vested, became members by virtue of their appointment as trustees. Members were required to subscribe three shillings per annum. It was not material to consider the qualification or status of associates. The affairs of the association were in the hands of a general committee of management, consisting of a president, two vice presidents, a treasurer, two secretaries, and at least nine members. The committee had power to suspend or expel any member whose conduct was found inconsistent in their judgment with the Christian character. The agencies for the attainment of the objects of the association were, first, the personal efforts of the members; second, devotional meetings; third, social meetings; fourth, classes for Biblical instruction; fifth, the delivering of addresses and lectures; and, sixth, the diffusion of Christian and other suitable literature.

Before the first of the offenses charged against the prisoner was committed, the members of the association proposed to build, and afterwards built, a hall or place of meeting for the purposes of the association at a cost of nearly £200, of which about £40 was still owing. To this building every member had the right of entry and was entitled to a latchkey. The prisoner became a member of the association in 1878, and had continued to be a member up to the time of the trial. As and being such a member he solicited and obtained for the association from divers persons many sums of money as donations or subscriptions on account of and for the general purposes of the association, towards the building fund, and towards the liquidation of the aforesaid debt of £40. Three of these sums it was that the prisoner was charged with and found guilty of embezzling.

If the association was a copartnership within the meaning of St. 31 & 32 Vict. c. 116, § 1, the conviction was to stand affirmed. If on the contrary it was not, the conviction was to be reversed.[1]

Walton, for the prisoner. The only question is whether this association is a copartnership. The terms of the statute clearly show that the copartnerships contemplated thereby are copartnerships in the ordinary sense of the term, viz., for the purposes of gain or profit. Lindley, L. J., in his work on Partnership, p. 1, gives an explanation of the term "partnership," which shows that the necessary idea of a partnership is that it should have for its object the acquisition and division of gain. He says: "Without attempting to define the terms 'partners' and 'partnership,' it will suffice to point out as accurately as possible the leading ideas involved in these words.

[1] St. 31 & 32 Vict. c. 116, § 1, provides that "if any person, being a member of any copartnership, or being one of two or more beneficial owners of any money, goods, or effects," etc., "shall steal or embezzle any such money, goods, or effects," etc., "of or belonging to any such copartnership or to such joint beneficial owners, every such person shall be liable to be dealt with, tried, convicted, and punished for the same as if such person had not been or was not a member of such copartnership or one of such beneficial owners."

The terms in question are evidently derived from to part, in the sense of to divide amongst or share; and this at once limits their application, although not very precisely, for persons may share almost anything imaginable, and may do so either by agreement or otherwise. But, in order that persons may be partners in the legal acceptance of the word, it is requisite that they shall share something by virtue of an agreement to that effect, and that that which they have agreed to share shall be the profit arising from some predetermined business engaged in for their common benefit. * * * To use the word 'partnership' to denote a society not formed for gain is to destroy the value of the word, and can only lead to confusion. Nor is it consistent with the modern usage. Lord Hale and older writers use copartnership in the sense of co-ownership, but this is no longer customary, and, as will be shown hereafter, there are many important differences between the two." This is not an association for the purposes of profit or gain.

Lord COLERIDGE, C. J. It seems to me that this conviction cannot be supported. I cannot find any authority throwing any doubt on the accuracy of the passage in Lindley on Partnership, which makes the participation in profits essential to the English idea of partnership, and states that, although in former times the word "copartnership" was used in the sense of "co-ownership," the modern usage has been to confine the meaning of the term to societies formed for gain. A number of definitions given by writers from all parts of the world are appended to the passage, and in all of them the idea involved appears to be that of joint operation for the sake of gain. The association in the present case is not a copartnership in any sense of the word into which the notion of co-operation for the purpose of gain enters. We must construe the word "copartnership" as used in the act according to the meaning ordinarily attached to it by the decisions and text-books on the subject. This association does not come within that meaning. The only point reserved for us is whether this association is a copartnership within the act. Inasmuch as we are of opinion that it is not, the conviction must be reversed.[2]

FIELD, HAWKINS, and WILLIS JJ., concurred.

DOW v. STATE BANK OF SLEEPY EYE.

(Supreme Court of Minnesota, 1903. 88 Minn. 355, 93 N. W. 121.)

Action by Lorenzo E. Dow against the State Bank of Sleepy Eye. Judgment for plaintiff, and from an order denying a motion for new trial defendant appeals.

COLLINS, J. March 18, 1901, five persons (Whiteside, Farrell, Spence, and Reichenthal, of the city of Chicago, and L. P. Jensen,

[2] The concurring opinion of Denman, J., is omitted.

of Sleepy Eye, in the state of Minnesota) entered into a written agreement in which they stipulated that they "have agreed and do hereby mutually agree to form a limited partnership" to engage in a specified line of business in Chicago "for the term of five years, commencing with December 1, 1901, under the firm style of Whiteside, Farrell & Co." Each of the four men first mentioned was to contribute a certain sum of money to the capital fund, to be paid in full on or before December 1st, and were to be general partners. Jensen was to be a special partner, in accordance with the laws of Illinois, contributing $10,000 towards the capital—two-fifths of the whole—which sum was also to be paid on or before December 1st. It was recited that each of the parties, except Jensen, had deposited in bank, and in the name of the firm, on account of his subscription to the capital, the sum of $1,000, and that Jensen had deposited with Farrell his duly certified check for the same amount on account of his subscription, and that the deposit made by each of these parties was "as a guaranty of his faithful performance on his part of the agreement." This check was made payable to the order of Whiteside, Farrell & Co., the agreed firm name, and was to be held by Farrell personally, instead of being deposited in the bank. It was covenanted that on the failure on the part of any of the persons named to pay over the balance of his agreed contribution on or before December 1st, "and to proceed with and to engage in the partnership business herein, in this agreement provided for, as therein provided, then the" amount of the deposit of the party in default, with all interest, should be forfeited to such of the other parties as might be ready and willing to pay and to proceed with the partnership business; the amount forfeited to be divided equally between the nondefaulting parties. All interest earned on the amounts deposited by each of the persons not in default was to be paid over to them individually. It was also provided that: "Nothing contained in this paragraph shall be construed as depriving any of the parties to this agreement of any rights which they otherwise have at law or in equity for damages, beyond such sum so forfeited, for a failure on the part of any party or parties hereto to carry out and perform this contract."

There were other provisions as to a division of the profits, for a division of the work, the management of the business, the authority of the partners, for the submission of all questions of dispute between them, prohibiting the general partners from engaging in any other business after December 1st, during the five years, and also that, "in case of the death of any of the general partners or the special partner, such death shall not work a dissolution of the firm, but the surviving general partners shall continue the business in such case for the full time and in the manner provided for herein; and in such case the heirs and legal representatives of such deceased general partner shall stand in the same relation to such partnership as a special

partner would, subject to no greater liabilities and entitled to the same relative rights."

The check bore date of March 13th, a few days prior to the execution of the contract in Chicago, and evidently was made in contemplation of it. On the day of its date it was certified as good by the duly authorized officer of the bank on which it was drawn, at Jensen's request. Before anything further was done under the agreement, and on October 9, 1901, Jensen died. From the testimony it appears that on December 1st Farrell delivered the check to Whiteside, Spence, Reichenthal, and himself, who, it seems, were then acting as a partnership under the firm name mentioned in the check and in the agreement. On the 17th of December one of these four men, by authority of his associates, placed this firm name on the back of the check, and at the same time each one of the four indorsed the check individually to their attorneys in Chicago—Heckman, Elsdon & Shaw. It is claimed that on the same day the check was disposed of by Heckman to this plaintiff for value, and that the latter was a bona fide purchaser thereof. At this time it was indorsed by this firm of attorneys and by Wallace Heckman individually, one of the firm. At the trial a verdict for the plaintiff was ordered and returned for the full amount of the check, and this appeal is from a denial of defendant's motion, in the alternative, for judgment notwithstanding the verdict, or for a new trial.

The first question to which attention should be given is the agreement made between the five persons, and, as before stated, bearing date and actually executed in Chicago on March 18th. If that was nothing but an executory agreement to enter into a partnership upon the 1st day of December follwing (an inchoate partnership contract), the case must be disposed of upon the ground that the plaintiff was not and could not be a bona fide holder (a purchaser of the check free from all equities and defenses), because it was never properly indorsed or put in circulation by the payee. If the partnership had been formed as stipulated, then the right of the firm to indorse the check and convert the proceeds into capital funds would have been undoubted. If Jensen had lived, but had refused to proceed, the right of his proposed associates to indorse and put the check in circulation would have been implied. Under the agreement the check would have been forfeited to such of the other parties as stood ready to perform. But we are clearly of the opinion that Exhibit A was an executory contract entered into on the basis of the continuance of the life of each of the parties thereto. In itself it did not create a partnership, and the persons signing it never became partners, because performance became impossible when Jensen died. Such an event was not provided for in the agreement, and when it occurred the agreement was at once annulled as to all parties. The clause we have quoted, relating to the decease of one of the partners, was not applicable to a death occuring before a partnership had actually commenced. It is elementary

that partnership relations must always be assumed by mutual consent and unanimously, and not otherwise, for they are strictly voluntary and personal. A third person cannot be introduced into a firm as a partner without or against the consent of a single member. Jensen's legal representatives or his heirs at law could not take his place, and force themselves upon the other parties to the agreement. Either one of the survivors could refuse to proceed or to furnish his share of the capital, and could demand a return of the deposit, because Jensen had deceased and could not become a partner; nor could any one else, except by unanimous consent. His estate could not be compelled to pay the amount agreed by him to be paid toward the capital funds. It is plain that the other parties to the contract could not and should not be obliged to go into the business with a capital of $15,000, when it had been agreed that it should be $25,000, of which two-fifths ($10,000) was to be contributed by Jensen. And it is obvious from some of the provisions of the agreement that there was no intention to form a present partnership. But if we should hold that a partnership was actually entered into in March, when the contract was signed, every person named therein could be compelled to contribute the amount of capital subscribed by him. And Jensen's estate would not be relieved of pecuniary obligation when the check was paid, for there was no agreement that if the check was paid, or if damages were recovered in case of nonfulfillment, Jensen was to be relieved from his written obligation to contribute to the capital. The agreement was executory, and there was no partnership in præsenti. Persons who have entered into a contract to become partners at some future time, or upon the happening of some future contingency, do not become partners until the agreed time has arrived, or the contingency has happened. An executory contract does not create a partnership. The contract must be executed, and the partnership actually "launched," before the relation will arise. Even after the arrival of the stipulated time the parties are not necessarily partners, and in fact they are not partners unless the partnership is launched. Any act, the performance of which is made a condition precedent to the formation of the partnership, must be performed, before a partnership will be held to exist. The test is to ascertain from the terms of the agreement itself whether any time has to elapse or any act remains to be done before the right to share profits accrues, for, if there is, the parties will not be partners until such time has elapsed or the act has been performed. Shumaker, Partn. p. 78 et seq. These rules are laid down in every text-book and in all cases where the subject has been discussed. We have found none in which it has been held that an agreement for a partnership to commence at a specified future day created, alone and of itself, a present partnership, even as to third parties. More than this, not one of the provisions of this agreement indicates an intent to create a partnership in præsenti, and all are opposed to that idea. For illustration, the clause which

provided that in case of default by one or more of the parties the amount deposited by him or them should be divided among those who stood ready to fulfill. The amount was not to become an asset of the firm. Also the clause that gave to each of the parties whatever interest his deposit might earn before December 1st, and the clause that gave to each of the general partners full liberty to engage in other business until that day. It is obvious that goods could not have been purchased, nor could any other form of obligation have been incurred, in the firm name, and a recovery had, as against the partnership, by any person who knew the contents of, and was obliged to rely upon, Agreement A. * * *

As the firm of Whiteside, Farrell & Co., provided for in the agreement, and the payee of the check, never came into existence, the paper was never properly indorsed. The partnership was never launched, and the legal title to the check did not pass to his proposed associates when Jensen died. It follows that plaintiff did not derive title, and could not have been a bona fide purchaser, through the indorsements made. * * *

Order reversed. The verdict will be set aside, and judgment entered for defendant.

In re GIBBS' ESTATE.

Appeal of HALSTEAD.

(Supreme Court of Pennsylvania, 1893. 157 Pa. 59, 27 Atl. 383, 22 L. R. A. 276.)

Proceedings for settlement of the accounts of E. B. Gibbs, administrator of Henry Gibbs, deceased. From a decree dismissing exceptions to the report of the auditor disallowing the claims of W. F. Halstead, guardian of Mary E. Clapp and Henry Clapp, he appeals.

WILLIAMS, J. The appellant seeks to charge the estate of Henry Gibbs with money deposited by him, as guardian, in the Home Savings Bank, located at South Waverly, on the theory that the bank was a general partnership, and that the decedent was one of the partners. The appellees deny that the Home Savings Bank was a partnership, and assert that the decedent purchased shares of stock in the bank as and for the shares of stock in an incorporated bank, and not otherwise. At this point it seems desirable to define the words over which the contest extends.

First. What is a corporation? The several answers given by text writers may be reduced to the following formula: A corporation is an artificial person created by law as the representative of those persons, natural or artificial, who contribute to, or become holders of shares in, the property intrusted to it for a common purpose. As it is the creature of positive law, its rights, powers, and duties are prescribed by the law. Beyond the legitimate purposes which it was cre-

ated to serve, and the lines of limitation the law has drawn around it, it is without power to act or capacity to take. Thus a banking corporation, while fully competent to do what is usual and necessary in its own business, may not own and operate a railroad, or engage permanently in any other business than that for which it was created. It has neither the legal capacity nor the right to do so; and if it undertakes to go in any direction beyond its corporate powers its acts are ultra vires. The creation of a corporation is not within the power of the individuals who subscribe to its stock. It is exclusively the work of the law, and the best evidence of the existence of a corporation is the grant of corporate powers by the commonwealth.

Second. What is a corporation de facto? It is an apparent corporate organization, asserted to be a corporation by its members, and actually acting as such, but lacking the creative fiat of the law. In Tayl. Priv. Corp. 145, it is said that a de facto corporation may exist "when a body of men are acting as a corporation under color of apparent organization, in pursuance of some charter or enabling act." Their organization may be imperfect, so that upon a quo warranto they could not show a sufficient compliance with the law to justify the exercise of corporate powers, but as to parties dealing with them, and as to each other, they are estopped to deny that they are what they hold themselves out to be. In a recent case in Minnesota—Finnegan v. Knights of Labor, 52 Minn. 239, 53 N. W. 1150, 18 L. R. A. 778, 38 Am. St. Rep. 552—it was held that a de facto corporation exists when these three things concur, viz., a law under which the alleged corporation might be created, an attempt to organize under the law, an assumption and exercise of corporate powers under such attempted organization. In Methodist Church v. Pickett, 19 N. Y. 482, only two things were held necessary, viz., "the existence of a charter or law under which a corporation with the powers assumed might be lawfully created, and a user by the party to the suit of the rights claimed to be conferred by such a charter or law." Where there has been a substantial compliance with the law, the corporation is, of course, de jure. Where there has been no substantial compliance, but there has been nevertheless an assumption and exercise of corporate powers in pursuance of an attempted organization, the alleged corporation is such de facto only. The Minnesota courts hold the correct rule, and three things are necessary to create the liability: A law or charter under which an organization de jure might be affected; an attempt to organize, which falls so far short of the requirements of the law or charter as to be ineffectual; an assumption and exercise of corporate powers notwithstanding the failure to comply with the law or charter.

Third. What is a partnership? Perhaps the best definition is that given by Story: A relation created by a "contract between two or more persons to place their money, effects, labor, or skill, or some or all of them, in lawful commerce, and divide the profits between them." Its foundation is a contract, express or implied. It results from the

act of the parties, not from the act of the law. Hedge's Appeal, 63 Pa. 273; 17 Amer. & Eng. Enc. Law, 829. See, also, Moddewell v. Keever, 8 Watts & S. 63; Channel v. Fassitt, 16 Ohio, 166; Murray v. Bogert, 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; Phillips v. Phillips, 49 Ill. 437. But as to third parties one may be held liable as a partner by implication of law arising upon his own acts, contrary even to his own intention. Thus the officers and acting members of a corporation de facto may be liable as partners if their conduct has led others to trust the concern upon that basis. Stafford National Bank v. Palmer, 47 Conn. 443. But without a contract of partnership, or such acts and declarations as lead others to infer its existence, and to extend credit on that basis, there is no foundation on which liability as a partner can rest. The best evidence of the existence of a partnership is the contract creating it. If proof of the contract is not within reach, its existence may be inferred from proof of contribution to the partnership stock. If direct proof of contribution cannot be had, it may be inferred from participation in profits. In the absence of all this, the acts and declarations of the parties sought to be charged may be resorted to. Participation in profits is not conclusive proof of the existence of the partnership relation (Edwards v. Tracy, 62 Pa. 374); but both in England and in this country it is cogent evidence upon the question. It puts the defendant upon his proofs explanatory of the fact. If he is able to show that such participation was referable to some other reason such as compensation for services rendered by him as agent, broker, salesman, or otherwise, the prima facies is overcome. So, if the participation in the profits is referable to some other relation than that of partnership between the participants, such as membership in a joint-stock association or a corporation, the effect of proof of participation will be overcome.

In the light of these well-settled rules, let us consider briefly the position of the parties, and the important findings of fact made by the learned auditor in this case. The claimant's right to share in the fund in court rested on the theory that the Home Savings Bank in which the money of his wards had been deposited, was a partnership, and that the decedent was a partner. The burden of proving the fact that the bank was a partnership was on him; and, as was said in Hallstead v. Coleman, 143 Pa. 354, 22 Atl. 977, 13 L. R. A. 370, "until that proof was given, the defendants were not called upon to enter upon their defense." The proof made upon this subject showed the organization of a bank under the name of the Home Savings Bank, with a president, cashier, and a board of directors. This is the mode of organization usually adopted by corporations, and did not tend to prove a partnership. It was then shown that the decedent bought and held certificates of stock in the bank, after its organization, which recited not the formation of a partnership, but the organization of a bank under the laws of the state, and the division of its capital into shares of $100 each. This is not the usual way in which

partnerships are created and partners admitted. It is the usual way in which stocks are issued and transferred in corporations. Proof was then made of the receipt by the decedent of several dividends upon his stock. These did not purport to be shares in the profits of firm business, but dividends, declared in the manner usual among corporations, upon the stock of the bank; and were paid by dividend checks drawn under the authority of a board of directors. The only other evidence was the returns made by the officers of the bank under the tax law of 1879, which threw very little light upon the character of the organization of the bank. Upon this proof the questions for the auditor were whether the bank was shown to be a partnership, and the decedent a partner. The bank did business for a number of years, and then failed. Its books and papers were in the hands, or subject to the control of, the receiver. The manner of its organization was not shown. The partnership agreement, if any such existed, was not produced. No proof was given that the officers or stockholders claimed or held out to the public that the stockholders were partners, or the bank a partnership enterprise. It was not alleged that the decedent participated in any manner in the business, or exercised any control over it. The whole case against him rested on the fact that he had purchased shares in a bank, then organized and doing business, and received dividends declared by the directors, and paid to him in a cashier's check. We are not surprised that the learned auditor was led to ask, "What is there in all this evidence, from the beginning of the business to the failure, tending to prove a partnership?" nor that he answered his own question by holding that this proof was insufficient to establish prima facie the existence of the partnership relation. On the other hand, there was much tending to show that Henry Gibbs understood that he was the holder of stock in an incorporated bank, and that the bank assumed and exercised corporate powers, and was dealt with by the public as a corporation. The form of its certificates, the manner of their transfer, the election of directors by the stockholders, the management of the business of the bank by the directors and the officers elected by them, the mode of declaring and paying dividends, were all suggestive of a corporation. They were not suggestive of a partnership. We are unable, therefore, to say that the auditor erred in finding that the bank was not shown to be a partnership. The learned judge who heard the exceptions to this report seems to have concurred with the auditor, and we require, under such circumstances, to be satisfied that a mistake was made before interfering with the findings. We are not so satisfied; but are of opinion that the state of the evidence justified the auditor's conclusion. This disposes of the whole case. * * *

Decree affirmed.

SECTION 5.—PARTNERSHIP BY ESTOPPEL.

DE BERKOM v. SMITH et al.

(At Nisi Prius, before Lord Kenyon, 1793. 1 Esp. 29.)

Assumpsit to recover the value of a quantity of foreign lace against the defendants, charging them as partners.

It was admitted that Smith, one of the defendants, was liable; but the other defendant, Lewis, denied that he was a partner. This was the only question in the case.

The evidence on the part of the plaintiff was: That he was a foreigner, living at Lisle, in Flanders; that, having been applied to by the defendants for a quantity of lace on credit, before he would furnish it, he wrote over to his correspondent in London, to inquire concerning their circumstances and situation; that his correspondent had inquired from a Mr. Botham, a merchant in London, who informed him that they were in partnership in trade, which information the correspondent communicated to the plaintiff, who in consequence thereof gave them the goods on the terms they asked.

Mr. Botham's clerk was called, and proved that the only connection in trade between Mr. Botham and the defendants was in discounting bills, which Mr. Botham had been in the habit of doing for Smith, one of the defendants; but that, on discounting a bill at one time for Smith, he had introduced Lewis to him as his partner.

Lord Kenyon, upon this evidence, ruled that it was not sufficient to charge Lewis as his partner. His Lordship said that persons might be partners in a particular concern or business, but that notwithstanding, if they did not appear to the world as partners, that it should not be sufficient to constitute a general partnership and make them liable in other cases not connected with such particular business; that the circumstance in evidence of the introduction of Lewis to Mr. Botham should be taken secundum subjectam materiam—that is, as applying to the transaction in which Smith was concerned with Mr. Botham, the discounting of bills—to which transaction only it should be confined; and that he was therefore of opinion that without further evidence a general partnership could not be established, in order to charge Lewis, the other defendant, in this action.

It afterwards, however, appearing in evidence that in fact Lewis had represented himself to the plaintiff as partner in trade with Smith, his Lordship in his charge to the jury added that, though in point of fact parties are not partners in trade, yet if one so represents himself, and by that means gets credit for goods for the other, that both shall be liable.

The plaintiff recovered.

THOMPSON et al. v. FIRST NAT. BANK OF TOLEDO, OHIO.

(Supreme Court of the United States. 1884. 111 U. S., 529, 4 Sup. Ct. 689, 28 L. Ed. 507.)

GRAY, J. This action was brought by the First National Bank of Toledo, Ohio, a national banking association established at Toledo, against William H. Standley, William H. Whiteside, Josephus Atkinson, Edward R. Thompson, and Joseph Uhl, as partners in the business of private bankers at Logansport, Ind., under the name of the People's Bank, upon a draft for $5,000, drawn and accepted by the partnership on August 25, 1877, payable in 90 days after date to the order of the plaintiff's cashier, and taken by the plaintiff in renewal of a like draft discounted by it for the partnership on May 5, 1877. Thompson filed a separate answer, denying that he was a member of the partnership, or liable to the plaintiff on the draft sued on. He died pending the suit, and it was revived against his administrators. * * *

The jury returned a general verdict for the plaintiff, upon which judgment was rendered. The defendants sued out this writ of error.

The plaintiff at the trial sought to charge Thompson with liability as a partner upon two grounds: First, that he was actually a partner; second, that, if not actually a partner, he had held himself out to the world as such. And the case was submitted to the jury upon both grounds.

The first and second assignments of error relate to the exclusion of evidence offered by the defendants bearing upon the first ground of action. The third and fourth assignments of error relate to the instructions given and refused as to the second ground of action.

[The first and second assignments of error were sustained.] * * *

The remaining and the principal question in the case is whether the liability of Thompson, by reason of having held himself out as a partner, was submitted to the jury under proper instructions.

The court was requested to instruct the jury that if Thompson was not in fact a member of the partnership, the plaintiff could not recover against him, unless it appeared from the testimony that he had knowingly permitted himself to be held out as a partner, and that the plaintiff had knowledge thereof during its transaction with the partnership. The court declined to give this instruction, and instead thereof instructed the jury, in substance, that if Thompson permitted himself to be held out to the world as a partner, by advertisements and otherwise, as shown by the evidence, and to be introduced to other persons as a partner, the plaintiff was entitled to the benefit of the fact that he was so held out, and he was estopped to deny his liability as a partner, although the plaintiff did not know that he was so held out, and did not rely on him for the payment of the plaintiff's debt, or give credit to him, in whole or in part. This court is of opinion that

the circuit court erred in the instructions to the jury, and in the refusal to give the instruction requested.

A person who is not in fact a partner, who has no interest in the business of the partnership and does not share in its profits, and is sought to be charged for its debts because of having held himself out, or permitted himself to be held out, as a partner, cannot be made liable upon contracts of the partnership except with those who have contracted with the partnership upon the faith of such holding out. In such a case, the only ground of charging him as a partner is that, by his conduct in holding himself out as a partner, he has induced persons dealing with the partnership to believe him to be a partner, and, by reason of such belief, to give credit to the partnership. As his liability rests solely upon the ground that he cannot be permitted to deny a participation which, though not existing in fact, he has asserted, or permitted to appear to exist, there is no reason why a creditor of the partnership, who has neither known of nor acted upon the assertion or permission, should hold as a partner one who never was in fact, and whom he never understood or supposed to be, a partner, at the time of dealing with and giving credit to the partnership. There may be cases in which the holding out has been so public and so long continued that the jury may infer that one dealing with the partnership knew it and relied upon it, without direct testimony to that effect. But the question whether the plaintiff was induced to change his position by acts done by the defendant or by his authority is, as in other cases of estoppel in pais, a question of fact for the jury, and not of law for the court. The nature and amount of evidence requisite to satisfy the jury may vary according to circumstances. But the rule of law is always the same: that one who had no knowledge or belief that the defendant was held out as a partner, and did nothing on the faith of such a knowledge or belief, cannot charge him with liability as a partner if he was not a partner in fact.

The whole foundation of the theory that a person who, not being in fact a partner, has held himself out as a partner, may be held liable as such to a creditor of the partnership who had no knowledge of the holding out, and who never gave credit to him or to the partnership by reason of supposing him to be a member of it, is a statement attributed to Lord Mansfield in a note of a trial before him at nisi prius, in 1784, as cited by counsel in a case in which it was sought to charge as a partner one who had shared in the profits of a partnership. By so much of that note as was thus cited, which is the only report of the case that has come down to us, it would appear that in an action by Young, a coal merchant, against Mrs. Axtell and another person, to recover for coals sold and delivered, the plaintiff introduced evidence that Mrs. Axtell had lately carried on the coal trade, and that the other defendant did the same under an agreement between them, by which she was to bring what customers she could into the business, and the other defendant was to pay her an annuity, and also two

shillings for every chaldron that should be sold to those persons who had been her customers or were of her recommending; and that bills were made out in their joint names for goods sold to her customers; and that the jury found a verdict against Mrs. Axtell, after being instructed by Lord Mansfield that "he should have rather thought, on the agreement only, that Mrs. Axtell would be liable, not on account of the annuity, but the other payment, as that would be increased in proportion as she increased the business. However, as she suffered her name to be used in the business, and held herself out as a partner, she was certainly liable, though the plaintiff did not, at the time of dealing, know that she was a partner, or that her name was used." Young v. Axtell, at Guildhall Sittings after Hilary Term, 24 Geo. III., cited in Waugh v. Carver, 2 H. Bl. 235, 242. But as the case was not there cited upon the question of liability by being held out as a partner, it is by no means certain that we have a full and accurate report of what was said by Lord Mansfield upon that question; still less that he intended to lay down a general rule, including cases in which one, who in fact had never taken any part in or received any profits from the business, held himself out as a partner.

In delivering the judgment of the Common Bench in Waugh v. Carver, Chief Justice Eyre said: "Now a case may be stated in which it is the clear sense of the parties to the contract that they shall not be partners; that A. is to contribute neither labor nor money; and, to go still further, not to receive any profits. But, if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner, not upon the ground of the real transaction between them, but upon principles of general policy, to prevent the frauds to which creditors would be liable if they were to suppose that they lent their money upon the apparent credit of three or four persons, when in fact they lent it only to two of them, to whom, without the others, they would have lent nothing." 2 H. Bl. 246. This statement clearly shows that the reason and object of the rule by which one, who, having no interest in the partnership, holds himself out as a partner, is held liable as such, are to prevent frauds upon those who lend their money upon the apparent credit of all who are held out as partners; and the later English authorities uniformly restrict, accordingly, the effect of such holding out.

In McIver v. Humble, in the King's Bench in 1812, Lord Ellenborough said: "A person may make himself liable as a partner with others in two ways: Either by a participation in the loss or profits, or in respect of his holding himself out to the world as such, so as to induce others to give a credit on that assurance." And Mr. Justice Bayley said: "To make Humble liable, he must either have been a partner in fact in the loss and profit of the ship, or he must have held himself out to be such. Now here he was not in fact a partner, and the goods were not furnished upon his credit, but upon the credit of Holland and Williams." 16 East, 169, 174, 176. In Dickinson v. Valpy, in the same court, in 1829, Mr. Justice Parke (afterwards

Baron Parke and Lord Wensleydale) said: "If it could have been proved that the defendant had held himself out to be a partner, not 'to the world,' for that is a loose expression, but to the plaintiff himself, or under such circumstances of publicity as to satisfy a jury that the plaintiff knew of it and believed him to be a partner, he would be liable to the plaintiff in all transactions in which he engaged and gave credit to the defendant upon the faith of his being such partner. The defendant would be bound by an indirect representation to the plaintiff arising from his conduct, as much as if he had stated to him directly and in express terms that he was a partner, and the plaintiff had acted upon that statement." 10 Barn. & C. 128, 140. See, also, Carter v. Whalley, 1 Barn. & Adol. 11.

In Ford v. Whitmarsh, in the Court of Exchequer in 1840, a direction given by Baron Parke to the jury in substantially the same terms was held by Lord Abinger, Baron Parke, Baron Gurney, and Baron Rolfe (afterwards Lord Cranworth) to be a sound and proper direction; and Baron Parke, in explaining his ruling at the trial, said: "I told the jury that the defendant would be liable if the debt was contracted while he was actually a partner, or upon a representation of himself as a partner to the plaintiff, or upon such a public representation of himself in that character as to lead the jury to conclude that the plaintiff, knowing of that representation, and believing the defendant to be a partner, gave him credit under that belief." Hurl. & W. 53, 55.

In Pott v. Eyton, in the Common Bench in 1846, which was an action by bankers to recover a balance of account against Eyton and Jones, on the ground that either they were actual partners in the business carried on by Jones, or Eyton had by his own permission been held out as a partner, Chief Justice Tindal, delivering the judgment of the court, said: "There was no evidence to show that credit was in fact given to Eyton, or that the bankers knew that his name was over the door of the shop at Mostyn quay, or that they supposed him to be a partner. One person who had been manager, and another who had been a clerk, in the bank, were in court; and if they could have given such evidence, they would no doubt have been called as witnesses. We must assume, therefore, that credit was given to Jones alone: and, if Eyton is to be made liable, that must be on the ground of an actual partnership between himself and Jones." 3 C. B. 32, 39. In Martyn v. Gray, in the same court, in 1863, Chief Justice Erle and Mr. Justice Willes expressed similar opinions. 14 C. B. (N. S.) 824, 839, 843. The decision of the Court of Exchequer in Edmundson v. Thompson, 1861, is to the like effect. 31 Law J. (N. S.) Exch. 207, 8 Jur. (N. S.) 235.

Mr. Justice Lindley, in his treatise on the Law of Partnership, sums up the law on this point as follows: "The doctrine that a person holding himself out as a partner, and thereby inducing others to act on the faith of his representations, is liable to them as if he were in fact a partner, is nothing more than an illustration of the general principle

of estoppel by conduct." "The expression in Waugh v. Carver, 'if he will lend his name as a partner, he becomes as against all the rest of the world a partner,' requires qualification; for the real ground on which liability is incurred by holding one's self out as a partner is that credit has been thereby obtained. This was put with great clearness by Mr. Justice Parke in Dickinson v. Valpy." "No person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz.: First, the alleged act of holding out must have been done either by him or by his consent; and, secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done cannot be imputed to the person sought to be made liable; and, in the absence of the second, the person seeking to make him liable has not in any way been mislead." Lindl. Partn. (1st Ed.) 45–47, (4th Ed.) 48–50.

The current of authority in this country is in the same direction. Benedict v. Davis, 2 McLean, 347, Fed. Cas. No. 1,293; Hicks v. Cram, 17 Vt. 449; Fitch v. Harrington, 13 Gray (Mass.) 469, 74 Am. Dec. 641; Wood v. Pennell, 51 Me. 52; Sherrod v. Langdon, 21 Iowa, 518; Kirk v. Hartman, 63 Pa. 97; Hefner v. Palmer, 67 Ill. 161; Cook v. Penrhyn Slate Co., 36 Ohio St. 135, 38 Am. Rep. 568; Uhl v. Harvey, 78 Ind. 26. The only American case, cited at the bar, which tends to support the ruling below, is the decision of the Commission of Appeals in Poillon v. Secor, 61 N. Y. 456. And the judgment of the Court of Appeals in the later case of Central City Savings Bank v. Walker, 66 N. Y. 424, clearly implies that in the opinion of that court a person not in fact a partner cannot be made liable to third persons on the ground of having been held out as a partner, except upon the principle of equitable estoppel, that he authorized himself to be so held out, and that the plaintiffs gave credit to him.

The result is that both, upon principle and upon authority, the third and fourth assignments of error, as well as the first, must be sustained, the judgment of the circuit court reversed, and the case remanded to that court with directions to order a new trial.

FLETCHER v. PULLEN et al.

(Court of Appeals of Maryland, 1889. 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355.)

MILLER, J. The plaintiffs, who are nurserymen in Milford, Del., sued Bramble & Fletcher, as partners in the same business at Cambridge, in this state, for fruit trees sold and delivered to them in the autumn of 1886. Bramble died before the trial, and Fletcher defended upon the ground that he was not a partner. The exceptions relate mainly to the admissibility of evidence upon the question, not whether Fletcher & Bramble were actually partners inter sese, but whether Fletcher had held himself out, or had permitted himself to be held out,

as a partner, so as to become responsible to third parties. The law on this subject, well established by authority, may be stated thus: "The ground of liability of a person as partner who is not so in fact is that he has held himself out to the world as such, or has permitted others to do so, and by reason thereof is estopped from denying that he is one as against those who have in good faith dealt with the firm or with him as a member of it. But it must appear that the person dealing with the firm believed, and had a reasonable right to believe, that the party he seeks to hold as a partner was a member of the firm, and that the credit was to some extent induced by this belief. It must also appear that the holding out was by the party sought to be charged, or by his authority, or with his knowledge or assent. This, where it is not the direct act of the party, may be inferred from circumstances, such as from advertisements, shop bills, signs, or cards, and from various other acts from which it is reasonable to infer that the holding out was with his authority, knowledge, or assent; and whether a defendant has so held himself out, or permitted it to be done, is in every case a question of fact, and not of law." Thomas v. Green, 30 Md. 1; 1 Lindl. Partn. 45; Thompson v. Bank, 111 U. S. 536, 537, 4 Sup. Ct. 689, 28 L. Ed. 507; 5 Wait, Act. & Def. 113, 114. These general rules apply to the present case.

The evidence shows that there was, in or near Cambridge, a fruit farm and nursery on about 15 acres of Fletcher's land, which Bramble had occupied and managed from the year 1881 to 1887. The plaintiffs then proved that in October and November, 1886, they received several letters, postal cards, telegrams, and circulars from Cambridge, signed, "Fletcher & Bramble," representing them to be partners, and the envelopes in which the letters were inclosed were stamped with the same firm name. These letters contained orders for fruit trees, and the first of them gave a reference to a Mr. Van Horst, formerly of Milford, but then residing in Cambridge. The plaintiffs not knowing the firm, nor by whom the letters were written, wrote to Van Horst and others, inquiring as to its credit and standing, and in reply received information to the effect that Fletcher was entirely responsible, but that Bramble was worth nothing. Upon this information, and receiving no intimation that Fletcher was not a partner, they filled the orders and delivered the trees, relying upon his credit. Each item of this testimony was excepted to as it was offered, upon the ground that these letters, circulars, and envelopes were written and gotten up by Bramble without Fletcher's knowledge or consent. We think, however, they were all admissible, not because the acts and declarations of Bramble would bind Fletcher, as of course they would not, unless he was an actual partner, but for the purpose of showing that the plaintiffs believed, and had good reason to believe, that he was a partner, and that they trusted the supposed firm upon the faith of his responsibility. To prove this was an important link in the plaintiffs' case, and evidence tending to prove it was, in our opinion, admissible.

The plaintiffs then proved that an advertisement signed, "Fletcher & Bramble," calling attention to their nursery, offering their trees for sale, and soliciting from the public continuance of confidence and orders, was published in two weekly newspapers of Cambridge, where Fletcher lived, for three months during the year 1884. In one of these papers there was also a local notice of the advertisement. These were also prepared, inserted, and paid for by Bramble, without Fletcher's knowledge; but it was proved that during the time of their publication he was a subscriber to both papers, and they were regularly sent him. There is also clear proof that he actually knew of them while they were being published, and never inserted in either of the papers any denial of the partnership. From all this it was competent for a jury to infer that he was held out to the public by Bramble as a partner, with his knowledge and assent; and we are of opinion the plaintiffs were entitled to prove this, though they never saw the advertisements, and were not influenced by them in trusting the firm. They had already proved they had so trusted it in good faith, and upon good grounds, and we think they had the right to resort to these antecedent advertisements, and to this proof, for the purpose of showing that Fletcher had been so held out to the public with his knowledge and assent. It was evidence to go to the jury upon that subject, and, if uncontradicted, would have made him a partner, at least as to all third parties who had trusted the firm in good faith upon that supposition. Having knowledge of these advertisements, it was his duty to deny the partnership, if he wished to escape liability. But what was he to do, and how much? We do not say he was under a legal obligation to publish a repudiation of the partnership in the same newspapers, or in any other, though this would seem to be a very obvious and the most efficient mode of proclaiming such denial, and the fact that he failed so to do was a circumstance to go to the jury. But we take it that the rule upon this subject, stated by a very eminent jurist, is reasonable and just: "If one is held out as a partner, and he knows it, he is chargeable as one, unless he does all that a reasonable and honest man should do, under similar circumstances, to assert and manifest his refusal, and thereby prevent innocent parties from being misled." Pars. Partn. *134. It follows that the court below was right in admitting all the evidence offered by the plaintiffs, and in rejecting the defendant's first prayers. In regard to his second, third, and fourth prayers, all that need be said is that the propositions they contain are all embraced in his fifth prayer, which the court granted with a single modification, to which we see no valid objection.

We come now to the rulings excluding certain evidence offered by the defendant to show and sustain his denial and repudiation of the partnership. His own testimony was to the effect that Bramble was simply his tenant of the land for the term of six years from 1881; that Bramble had a fruit-tree nursery on the land, but he himself had nothing to do with it, and never entered into a contract of partnership

with Bramble, either written or verbal, in the nursery business, or any other; that he never held himself out as such partner, and never lent his name, or authorized the use of it by Bramble, with reference to this business, or any other, that he never knew of the letters, circulars, and envelopes written and used by Bramble until they were produced in court at the trial; that the advertisements and local notice were inserted without his knowledge or consent, and he never knew anything about them until they appeared in the papers; that he never put himself to the trouble and expense of publishing in these papers, or in any others, a contradiction of the advertisements, but had on all occasions, to town people and country people, when the subject was mentioned to him, and often when it was not, denied the existence of any partnership, and repudiated the advertisements as unauthorized by him. All this was allowed to go in without objection, but it is to be observed that he admits he knew of the advertisements which clearly and publicly proclaimed the partnership, and never published in any newspaper any denial of it. We have said he was under no legal obligation to make publication, but that it was his duty to do all that a reasonable and honest man should do, under similar circumstances, to manifest his denial. This is the important question in the case, and it was one solely for the jury to determine. On this issue of fact he was entitled to adduce all the evidence he could, leaving it for the jury to decide whether, upon the whole of it, they thought he had done all that a reasonable and honest man ought to have done. Under this rule, he was entitled to the benefit of any evidence in corroboration of his own testimony which tended to prove the publicity of his denial. Now, in addition to his own general evidence on this subject he offered to prove: (1) By the editor of one of the papers in which the advertisement and notice appeared, that, when the witness called upon him to pay for the same, he refused to do so, repudiated all partnership with Bramble, declared he had nothing to do with Bramble's business, and would have nothing to do with his bills. (2) By the postmaster of Cambridge, that soon after the publication of the advertisements witness delivered to Fletcher certain mail-matter addressed to "Fletcher & Bramble," but he returned it unopened, and refused to accept the same, telling witness he had nothing to do with Bramble's business, and was no partner of his. (3) That in July, 1885, he and Bramble were sued as partners by the steamboat company before a magistrate in Cambridge, on a bill for freight; that there was a crowd at the trial, and he resisted the suit, and refused to pay the account, on the ground that he had nothing to do with Bramble's business; that the magistrate gave judgment in his favor, and the case was much discussed in the community, especially by the steamboat agent, who made great complaint because the magistrate had decided in his favor.

In our opinion, these items of evidence should have been admitted. It is not for this court to pass upon their weight or effect, no mat-

ter how slight or inadequate, as a denial of the partnership publicly proclaimed in the newspapers, we may deem them to be. This is a matter solely for the jury. Our duty is simply to determine the question of their admissibility as evidence, and we think the court erred in rejecting them. We are also of opinion that the agreement, or "lease," as it is called, between Fletcher and Bramble, for the land upon which the nursery was carried on, should have been admitted. It was part of the defendant's case, to prove that he was not an actual partner with Bramble. This agreement was admissible for that purpose, if he could show that by its true construction it merely created the relation of landlord and tenant between them. The errors in rejecting the items of evidence referred to requires us to reverse the judgment, and award a new trial. But, in view of the fact that the court below acting as a jury found for the plaintiffs, notwithstanding they had granted the defendant's fifth prayer, in which all his own testimony in denial of the partnership was expressly submitted to the consideration of the judges, we think each party should be required to pay his own costs, both in this court and in the court below. Judgment reversed, each party to pay his own costs in this court and in the court below, and new trial awarded.

SECTION 6.—DEFECTIVE CORPORATIONS.

BIGELOW v. GREGORY et al.

(Supreme Court of Illinois, 1874. 73 Ill. 197.)

This was an action of assumpsit, brought by Bigelow, appellant, against Charles A. Gregory, Franklin H. Watriss, Oramel S. Hough, and Reuben Hatch, as copartners, doing business under the name and style of the Warfield Cold Water Soap Company, to recover for goods sold and delivered. The defendants in the court below pleaded the general issue, and also interposed a further plea denying the partnership, verifying the same by affidavit. The cause was tried by the court without a jury, and the issues found and judgment rendered for the defendants. The plaintiff brings the record here by appeal to reverse the judgment.

From the testimony it appears that in November, 1870, the defendants, with one Isaac N. Gregory, signed a certain paper, commencing: "Articles of Association of Warfield's Cold Water Soap Company, of Milwaukee. We, the undersigned, being desirous of forming a company for the purpose of carrying on a manufacturing business, as hereinafter stated, under authority of the act of the Legislature of the state of Wisconsin relating to joint-stock companies,

approved April 2, 1858, and acts amendatory thereof, do hereby agree and certify that the name of the company is and shall be 'Warfield's Cold Water Soap Company, of Milwaukee' "—proceeding to state at length the objects of the company, the amount of capital stock, its number of shares, the term of existence of the company, the number and names of the directors for the first year, they being the subscribers themselves, how the capital stock should be paid, the signers subscribing for all the stock and agreeing to pay it as required by the directors, and concluding: "We hereby adopt the foregoing as the articles of association of said Warfield's Cold Water Soap Company, of Milwaukee, for the purpose of becoming a body politic and corporate under said name. Witness our hands, at Chicago, Illinois, this twenty-third day of November, A. D. 1870. Charles A. Gregory. Franklin H. Watriss. Oramel S. Hough. Reuben Hatch. Isaac N. Gregory."

This paper was filed in the office of the Secretary of State of Wisconsin on the 8th day of July, 1871, and in the office of the city clerk of Milwaukee August 23, 1871. It was also published in two newspapers in Milwaukee, the Guide and the Herald, September 13 and 15, 1871.

The only question here arising is whether the defendants were exempt from individual liability by reason of having become a corporation. We are of opinion that in this case, as the question here comes up, the right of the defendants to be considered a corporation depends upon their having complied with the requirements of their articles of association and the filing of the certificate. These are important acts as affects the public interest, as affording means of notice respecting the corporation to such as deal with it, so that they may regulate their action and give or withhold credit accordingly, and we think they are to be regarded as statutory prerequisites, essential to corporate existence.

The defendants are seeking escape from individual liability. Let them show that they have complied with the statute which enables them to do so, at least substantially, as respects the above-named acts. Such we regard to be the doctrine of the authorities. Unity Insurance Co. v. Cram, 43 N. H. 641; Mokelumne Mining Co. v. Woodbury, 14 Cal. 425, 73 Am. Dec. 658; Harris v. McGregor, 29 Cal. 124; Field v. Cooks, 16 La. Ann. 153; Angell & Ames on Corp. § 83.

This court has never held that individuals could make themselves a corporation by the mere signing of articles of agreement. And in the language of Parsons on Partnership, p. 544, "we do not believe that a joint-stock company, or any other partnership, can limit its own liabilities and become a corporation or limited partnership by its own act and without any regard to the formalities or requirements of the law." And see Stowe v. Flagg et al., 72 Ill. 397.

Nothing had been done toward incorporation, except the signing of the articles of association, until July 8, 1871, when the articles

were filed with the Secretary of State of Wisconsin. They may be regarded, perhaps, as substantially embracing the particulars required in the certificate. The greater portion of the indebtedness sued for had been contracted prior to that time. The filing of the articles in the office of the city clerk of Milwaukee, in which place the business of the corporation was to be transacted, and the publication in the newspapers, did not take place until after August 19, 1871, when the whole indebtedness had been contracted.

We are of opinion the defendants were liable as partners, and had not absolved themselves from responsibility as such by having become a corporation.

Judgment reversed.

RUTHERFORD v. HILL et al.

(Supreme Court of Oregon, 1892. 22 Or. 218, 29 Pac. 546, 17 L. R. A. 549, 29 Am. St. Rep. 596.)

Action by James A. Rutherford and Stephen G. Smith against J. W. Hill, R. P. Earhart, and Sherman Martin, as partners under the name and style of the Himes Printing Company. From a judgment on a verdict against them, defendants Hill and Earhart appeal.

The defendants are sued as partners under the firm name and style of the Himes Printing Company. The complaint does not anywhere allege that the defendants entered into an agreement of copartnership, but in lieu thereof the following facts are alleged: "That the defendants, on or about the 3d day of September, 1890, executed, acknowledged, and filed in the office of the clerk of the county court of Multnomah county and in the office of the secretary of state at Salem, Oregon, certain articles of incorporation as the Himes Printing Company; that the defendants, in violation of the laws for the formation of corporations subsisting in the state of Oregon, negligently failed to provide a stockbook and to secure stock subscriptions to said corporations; that, in spite of their said violation of the law, the defendants undertook to carry on the business provided for in said articles of incorporation, appointed one George H. Himes superintendent of their said business, and authorized him and the defendant Sherman Martin to represent them in all the transactions of said business; that said business was carried on under the firm name and title of the Himes Printing Company; that between May 1 and September 1, 1891, the plaintiff, at the instance and request of the defendants, through their agents, the aforesaid Himes and the defendant Martin, performed certain labor and services for the defendants, of the reasonable and agreed value of $213.14, which sum the defendants promised to pay; that the plaintiffs performed the aforesaid work relying on the credit and representations of the defendants for their payment." Earhart and Hill answered separately, and each

of them denied every material allegation of the complaint, except they did not deny executing and filing the articles of incorporation of the Himes Printing Company. The jury returned a verdict against the defendants Earhart and Hill for the amount claimed, upon which judgment was entered, from which this appeal was taken.

STRAHAN, C. J. * * * The sole question, therefore, seems to be whether or not, where three or more persons sign, acknowledge, and file articles of incorporation under the laws of this state, and do nothing further towards effecting an organization or carrying on the proposed business, and one of them assumes to do business under the proposed corporate name, and incurs liabilities, the other persons who signed said articles are liable. Appellants maintain that in such case there is no liability on the part of those who do not participate in the business either directly or indirectly, while the respondents seek to maintain the reverse of this proposition; and this contention presents the only question we need consider on this appeal.

The respondents contend that the executing and filing of the articles of incorporation, and the assumption of the corporate name by one of the parties, under which he does business, create a partnership between all the persons signing said articles, and to sustain this view they rely upon these authorities: Whipple v. Parker, 29 Mich. 380; Jessup v. Carnegie, 44 N. Y. Super. Ct. 260; Coleman v. Coleman, 78 Ind. 346; Pettis v. Atkins, 60 Ill. 454; Smith v. Warden, 86 Mo. 382; Garnett v. Richardson, 35 Ark. 144; Lindl. Partn. 5; Abbott v. Smelting Co., 4 Neb. 416; Johnson v. Corser, 34 Minn. 355, 25 N. W. 799. Some other authorities, similar in principle to these, might be cited, but they add nothing to this side of the question. Without stopping to distinguish these cases from the one now before us, we think the decided weight of authority, as well as the better reason, is the other way. Fay v. Noble, 7 Cush. (Mass.) 188, is an early case, in which it was held that the subscribers for and holders of stock in a manufacturing corporation which has been defectively organized, and transacted business under such defective organization, do not thereby become partners, general or special, in such business. In Trowbridge v. Scudder, 11 Cush. (Mass.) 83, it was held that the stockholders of a corporation do not become liable as partners on notes given by the treasurer of the corporation merely because after organizing they transacted no business. In First Nat. Bank of Almy v. Almy, 117 Mass. 574, it was held that the members of a corporation were not liable as partners by reason of having transacted business before the whole capital stock was paid in, as required by statute. In Humphreys v. Mooney, 5 Colo. 282, in considering the question now before the court it was said: "The doctrine of a partnership liability in such case is not found in law or reason, and is repugnant to the very purposes of the statute authorizing a corporation, one object of which is to limit individual liability." Substantially the same doctrine is announced in Gartside Coal Co. v. Maxwell (C. C.) 22

Fed. 197; Planters' & Miners' Bank v. Padgett, 69 Ga. 159; Stafford Nat. Bank v. Palmer, 47 Conn. 443; Ward v. Brigham, 127 Mass. 24; Central City Savings Bank v. Walker, 66 N. Y. 424; Jessup v. Carnegie, 80 N. Y. 441, 36 Am. Rep. 643; Blanchard v. Kaull, 44 Cal. 440; Mor. Corp. § 748. And 17 Amer. & Eng. Enc. Law, 866, after stating that the rule contended for by respondents had been adopted by quite a large number of cases, remarks: "But the weight of authority perhaps sustains the contrary rule that, if they were acting under the supposition that they were incorporated, and were assuming only the liability of stockholders, and not that of partners, they will not be held liable as such." And a long list of cases is cited to sustain this proposition.

It is not doubted that cases might arise, and can readily be imagined, where the incorporators sought to be charged might take such part in conducting the business, or hold themselves out to the world as partners or as principals in the business, that they would be held liable; but this would grow out of their conduct in carrying on the business, and not out of the mere fact of signing and filing the articles. If the appellants could be held liable in this case, such liability would rest on the mere act of signing and filing the articles, and not upon any participation in the business, either directly or indirectly. It would have to rest upon the theory that, by the mere signing the articles with Martin, they constituted him their general agent, to proceed to conduct the business contemplated by the proposed corporation, thus creating a liability for any act of his done within the scope of the powers of the proposed corporation. No authority to which our attention has been directed has gone so far, and we feel safe in saying that none can be found to support that doctrine. We therefore reverse the judgment, and remand the cause for such further proceedings as are not inconsistent with this opinion.

SECTION 7.—JOINT-STOCK COMPANIES.

CARTER et al. v. McCLURE et al.

(Supreme Court of Tennessee, 1897. 98 Tenn. 109, 38 S. W. 585, 36 L. R. A. 282, 60 Am. St. Rep. 842.)

Beard, J. The bill in this cause was filed by complainants, as creditors of McClure, Lucas & Co., seeking to hold the defendants liable for the debts of that concern, upon the theory that it was a commercial firm, of which defendants were members, at the time of the creation of these debts. The facts, so far as they are important in the decision of this case, and as they have been found by the Court of Chan-

cery Appeals, are: That these defendants, with others who are not sued, all members of an alliance lodge in the town of Huntland, in this state, entered into an agreement among themselves to raise a sum of money which, it was assumed, would be sufficient to establish a co-operative store in that place. This agreement was reduced to writing, and the names of the parties in interest were by them affixed to it, and over against his signature was placed the amount which each subscriber obligated himself to contribute to this joint enterprise. This agreement is in words and figures following, to wit: "Huntland, Tenn., Dec. 21, 1888. We, the undersigned, agree to pay to the directors, to be elected, the sum annexed to our respective names, by the first of January, 1889, for the purpose of establishing a co-operative store at Huntland, Tennessee. We further agree that the said money remain in the business for at least five years from beginning, unless two-thirds of the stockholders agree to discontinue the business in a shorter time. We further agree that three of the stockholders be elected annually as directors, to have full control of the stock hereunto subscribed. It is further agreed that the directors act in conjunction with R. W. McClure, who is a stockholder to the amount of $2,050, and who is to be the principal salesman, and in the transaction of all business between the said McClure and directors, the directors are to be regarded collectively or as a unit, and the said McClure as a unit." After the execution of this paper, the three directors provided for in it were duly chosen, and into their hands the subscribers paid the several sums they had agreed to contribute. These sums, aggregating $590, were turned over by the directors to Mr. McClure, who, adding the amount of $2,050, which he had agreed to place in the venture, purchased a stock of goods, and opened up a co-operative store in the name of R. W. McClure & Co., this being the business name agreed upon by McClure and the three directors. No incorporation ever took place, nor was such ever intended by these parties. The main purpose of the defendants, in entering into this business, was to avoid what they deemed to be the extortion theretofore practiced upon them in the sale of goods by the merchants of the country. While not embodied in their writing, yet one of the terms of the contract, and the one which chiefly, if not altogether, induced all the subscribers (save, no doubt, McClure) to become interested in this enterprise, was that they were to purchase such goods as they might require from the stock in this store at a profit not exceeding 10 per cent. above cost; and these directors were chosen as their representatives, especially, to look after McClure, who was the largest shareholder, as well as manager, and see that he kept faith with the subscribers in this matter. While the defendants, styling themselves in their written agreement as "stockholders," took no active personal control of the concern, yet they manifested a lively interest in its success. In addition to giving it the benefit of their own patronage, they were zealous in commending it to their neighbors.

At the end of the first year one Mosely desired to purchase an interest in the business. He, however, was not a member of the "alliance," and, organized as this enterprise was, in line with or under the inspiration of that movement, it was necessary that he become such before he could be allowed to make such purchase. In order to qualify him to this end, the rules of the "lodge" to which these defendants belonged were suspended, and at one meeting he was admitted to the privilege of full fellowship with them. He contributed $2,000 to the capital of the concern, and its name was changed to McClure, Mosely & Co. At the end of another term of 12 months Mosely sold out his interest to one Lucas and thereafter the enterprise was conducted in the name of McClure, Lucas & Co., until insolvency overwhelmed it with disaster. The claims of complainants accrued during the existence of and against this latter concern. In addition to these changes in the organization of and style of the business, two deaths occurred among the original subscribers—one of them before, and the other after, the creation of these debts. This latter death, however, can in no way affect this controversy, and will, therefore, not be further noticed. Upon this state of facts, it is insisted for the defendants—First, that this undertaking was in no sense a partnership, and that they did not sustain the relation of partners to either R. W. McClure & Co., Mosely, McClure & Co., or McClure, Lucas & Co.; secondly, if however, they are mistaken in this broad proposition, then that they were only partners in the firm of R. W. McClure & Co., and that all partnership relation and liability, on their part, were terminated or dissolved by the various changes already adverted to, and long prior to the creation of complainants' debts. The chancellor and the Court of Chancery Appeals held both these contentions against the defendants, and the case is now before us on an appeal from the decree of this last-named court.

1. Were those parties engaged in a partnership enterprise? All of the defendants earnestly disclaim any purpose of entering upon such an undertaking. While, as has been stated, the prime motive of these parties was to organize a mercantile establishment where their various needs would be supplied at reasonable figures, yet they confess that, outside of this, they expected to share in any profits earned by it in proportion to the respective amounts contributed by them. These amounts were small, yet they were to serve as a basis for such distribution of profits. It is no doubt true that the defendants did not contemplate a partnership, and each supposed that he was simply taking a share in a joint-stock enterprise, in which all he risked was the small sum paid for such share; yet it is for the law to determine, on the facts already given, whether a partnership was created, with all its attending liabilities. In Mallory v. Oil Works, 86 Tenn. 598, 8 S. W. 396, is quoted approvingly the definition of a partnership as given by Judge Story. "A partnership," says the former writer, "is usually defined to be a voluntary contract between two or more competent

persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a communion of the profits thereof between them." Story, Partn. § 2. The facts found by the Court of Chancery Appeals, a general outline of which is given above, disclose the constituent elements of a partnership as required by this definition. It is a case where these parties have embarked their money "in lawful commerce, * * * with the understanding that there" should be a division of profits earned. In addition to this, they have taken a firm name, and thus have advertised themselves to the world as a commercial partnership. Calling their contributions to the capital of this business a "subscription for stock," and taking certificates for their payments from the company as a joint-stock company, it not being incorporated, cannot alter their liability. "There is no intermediate association, or form of organization, between a corporation and a partnership, known to the common law, and, unless otherwise provided by statute, as is the case in England and New York, a joint-stock company is treated and has the attributes of a common partnership." 1 Bates, Partn. § 72. And Judge Story says that, "in joint-stock and other large companies, which are not incorporated, but are a simple, although an extensive, partnership, their liabilities to third persons are generally governed by the same rules and principles which regulate commercial partnerships." And such has been the conclusion of the courts wherever the character of joint-stock companies similar to the one in question has been passed upon, so far as our examination has disclosed. At least such was the holding in Hodgson v. Baldwin, 65 Ill. 532; Kenyon v. Williams, 19 Ind. 44; Manning v. Gasharie, 27 Ind. 399; Beaman v. Whitney, 20 Me. 413; Farnum v. Patch, 60 N. H. 294, 49 Am. Rep. 313. The Supreme Court of New Hampshire, in this last-cited case, have delivered an able, exhaustive opinion upon the law of partnership as it applies to an association like the one in question, and we content ourselves with what we have already said and by making special reference to that opinion. In the light of these authorities, we think there can be no doubt that these parties were partners in the firm of R. W. McClure & Co.

2. We think it equally clear, on the facts of this case, and in view of the legal principles applicable to them, that there was no termination of the partnership enterprise, resulting from the changes occurring during its progress, by the introduction and subsequent withdrawal of Mosely, and the accession of Lucas or his capital to it, or the death of one of the original subscribers intermediate between the start of this business and the final insolvency of McClure, Lucas & Co.; that, through all these changes, the defendants' relations remained as fixed by themselves in the beginning; and that they are liable as partners for the debts sought to be enforced in this cause. This conclusion we rest on two grounds: First. It is found by the Court of Chancery Appeals to be a fact that these defendants were

members of the alliance lodge that, by a suspension of its rules, hurriedly qualified Mosely, so that he might bring his capital and his name to the aid of this joint undertaking. They do not claim to have been ignorant of this proceeding, or to have offered any opposition to it, either in or out of their lodge, or that they made any protest against his accession to the business. On the contrary, their zeal for the success of the movement continued undiminished. And so with regard to the withdrawal of Mosely and the introduction of Lucas in his room and stead. The record shows consultation with quite a number of these defendants as to the advisability of this change, and an agreement with them in regard thereto, and acquiescence, at least by silence, on the part of the remainder. All these parties, through the various changes in the personnel of the organization, by death and purchase, and in the firm name under which the business was carried on, not only stood by and watched the movements of the concern, as one in which they had a part, but they made no claim of dissolution by reason thereof until confronted by the claims of these complainants. It was then too late. For, conceding that either one of these acts might have been availed of by the defendants as working a dissolution of their partnership, yet, at their election, they might waive this effect. Second. The nature of this enterprise repels the idea that it was in the contemplation of the parties that either death or any transfer of shares should work a dissolution of the business. Not only was it to continue for five years, "unless two-thirds of the stockholders 'agreed' to discontinue the business in a shorter time," but the shares of the stockholders were transferable. Says Mr. Bates, in his work on Partnership (volume 1, § 72): "The fact of transferable shares makes such an association different, not merely in magnitude, but in kind, from ordinary partnerships, because not based upon mutual trust and confidence in the skill, knowledge, and integrity of every other partner. Hence a sale of his shares by a member, the shares being transferable, is not a dissolution. Death of a member is not a dissolution, if such was the intent and the character of the association, in that the shares are transferable, and it is governed by officers, and is in the form of a corporation, is evidence of such intent." What the text-writers and the opinions of many courts call the "delectus personarum," an element in an ordinary commercial partnership, is lacking when a partnership assumes the character of a joint-stock company with transferable shares. 2 Bates, Partn. § 581; Machinists' Nat. Bank v. Dean, 124 Mass. 81; Walker v. Wait, 50 Vt. 668; McNeish v. Oat Co., 57 Vt. 316.

It follows that the assignments of error upon the decree of the Court of Chancery Appeals, in the particulars above indicated, must be overruled. The assignments of error upon the court's decree as to the Lipscomb claim are disposed of only. The decree of that court is in all things affirmed.

CHAPTER II.

THE CREATION OF A PARTNERSHIP.

SECTION 1.—ARISES OUT OF CONTRACT.

Societie is a contract by consent about a thing to be had or used in common on both sides. * * * But that only is properly called Societie, which by mutual consent is applied to that end, that there may be partnership or fellowship among the persons contracting; wherein so soon as they are fully agreed, the one is properly called the other's fellow. West's Symboleography, § 26.

PHILLIPS v. PHILLIPS.

(Supreme Court of Illinois, 1863. 49 Ill. 437.)

CATON, C. J. The only question in this case is one of fact. Was there a copartnership between John Phillips and his four sons, or was he the sole proprietor of the business about which the controversy has arisen? It must be remembered in the outset that this is a controversy inter sese, and is not between third parties and the alleged members of the firm. Parties may so conduct themselves as to be liable to third persons as partners when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not absolutely bound to know the real facts, while the certain truth is positively known to the alleged parties of a firm. A partnership can only exist in pursuance of an express or implied agreement to which the minds of the parties have assented. The intention or even belief of one party alone cannot create a partnership without the assent of the others. If John S. Phillips designed and really believed that there was a partnership, but to which his father and brothers never assented, and in the existence of which they did not believe, then there was no partnership, unless, indeed, a copartnership could be formed and conducted without their knowledge or consent. This would be simply absurd. We cannot in this way surprise them into a partnership of which they never dreamed.

Over 20 years ago John Phillips emigrated from Scotland and settled in Chicago with his family, consisting of a wife and four sons

and two daughters. He was then very poor. He was a wood turner by trade, and commenced that business in a very small way with a foot lathe. He was frugal, industrious, and honest, and prospered as but few men, even in this country, prosper. He labored hard with his own hands, and as his sons grew up they joined their work to his, all except John S., who at a proper age was put as an apprentice to learn the chair maker's trade; but, his health proving delicate, his father made an arrangement with his master by which his time was released when he had but partially learned his trade, when John S. returned home and took a more or less active part in the business of his father. His health was, however, for many years very delicate, and he was enabled to do but little physical labor. He, however, mostly took charge of the office and books, for which the testimony shows he was very well qualified, and where he rendered efficient service. In the meantime the business had grown from the smallest beginning, with a single foot lathe, to a large manufactory, with extensive machinery propelled by steam; and chair making, which was introduced at an early day, had become the principal or largest branch of the business. Thus this business was begun and continued and prospered till 1860, when the complainant left his father and the business, and filed this bill for an account as among partners.

The business had always been conducted, as it was begun, in the name of John Phillips, the father, although in a few instances bills were made out to John Phillips & Sons by persons with but a superficial acquaintance with them, which were paid without eliciting remark or particular attention. The books were all kept in the name of John Phillips, with the exception of a few entries made by a bookkeeper in the name of John Phillips & Sons. Indeed, there is, and can be, no question that, if there was a copartnership embracing the father and sons, the firm name adopted was John Phillips.

The complainant, to show a copartnership, proves that the sons all devoted their time and attention to the business after they attained their majority, without regular salaries as laborers or servants; that funds which they drew from the concern for their support were charged to each one separately, while neither received a credit for labor or services; that the father, upon one or two occasions, stated to third persons that his sons were interested in the business; and he also relies upon the appearances to the outside public and the interest which all took in the success of the business.

For the defense it is claimed that, following the habits and customs of their forefathers in Scotland, the sons continued to serve the father in the same relation and with the same fidelity after attaining their majority as before, under the distinct and often declared understanding that all should belong to the father during his life, and at his death the business and property should be left by him to his children, as he should think proper. If such was the understanding and purpose of the parties, then there was no partnership. Originally, undoubt-

edly, the entire concern belonged to the father, and it so continued, unless by the agreement of the father the sons were admitted into the concern as partners; for, as before intimated, we know of no means by which the sons could become partners with the father, and thus acquire a title to his property, without his knowledge or consent. Did the father ever consent that his sons, or either of them, should be admitted as partners with him? Did he ever agree that they should be part owners of this property? On repeated occasions the subject of a copartnership with his sons was presented to him, both in the presence of the complainant and his brothers, and he ever repudiated the suggestion in the most emphatic terms. The very suggestion, even, seemed to excite his indignation. Upon one occasion he expressed himself in this characteristic phrase: "Na, na! I will ha' nae sons for partners as long as I live. Damn them! they would put me out of the door." On none of these occasions do we find the complainant, or any of his brothers, claiming the existence of a copartnership; but, on the contrary, they silently acquiesced in the assertions of the father. Had there been ever any agreement, expressed or implied, that there should be a partnership, they, as parties to it, must have been aware of it. If not expressed in words, there must have been at least the mental intention and tacit understanding on the part of the father that they should be admitted as partners, and on their part to assume the benefits and liabilities of partners, and this could not be without their knowledge. Others might be deceived by appearances. Others, ignorant of the customs and traditions of their forefathers, which are so fondly cherished by emigrants from the old country, and particularly from Scotland, might draw erroneous conclusions as to the true relation existing between them as a family, by seeing men in middle life zealously bending their energies under the guidance of their father to the promotion of the success of the business. Whoever should apply customs prevalent among native Americans to this state of facts would unhesitatingly conclude that all were in partnership. And so, no doubt, many were deceived; nor was it deemed necessary by any of the parties, on all occasions, to undeceive them by a full explanation of this family arrangement.

But the question here is, what was the actual fact? and not what observers supposed was the fact from appearances. It is the internal truth we are seeking, and these external appearances are only important as they may enable us to arrive at this truth; and when we so find the truth by indubitable proof in a different direction than that indicated by these external appearances, then these must go for naught. Here we have the positive testimony of every living man who has the absolute knowledge of the facts, including the complainant himself, all testifying most unqualifiedly that there was no partnership.

Decree is reversed, and the bill dismissed.

SABEL et al. v. SAVANNAH RAIL & EQUIPMENT CO.

(Supreme Court of Alabama, 1903. 135 Ala. 380, 33 South. 663.)

TYSON, J. The important question presented is whether the agreement shown by the bill constituted complainants and respondents partners. It is made to appear that respondents called the complainants' attention to the possibility of purchasing on very favorable terms 17 secondhand narrow-gauge locomotives from the Plant System; and thereupon an agreement was made to purchase the engines, and whichever party (complainants or respondents) should have the opportunity to buy would do so "upon the best terms possible," and when purchased the engines should be sold on joint account. It further appears that respondents did buy, but it does not appear that the purchase was made on joint account. After the purchase, complainants, without knowing the terms of the contract of purchase, wrote the respondents, saying: "We had an agreement with you to purchase these locomotives on joint account. Please let us know what you have done in the matter." To this the respondents replied: "We have bought the seventeen narrow-gauge locomotives from the Plant System for $18,000, as they are. As we stated to you that we would consider you in the deal, if you desire to be half partners of this material, send us your check for $9,000, and we will consider you in on joint account." It does not appear what, if any, reply was made to this letter. It must be inferred that complainants made no reply, or declined the offer. Complainants allege that they afterwards discovered that respondents bought the engines for $17,000, without paying any cash except as the engines were sold by them, and that they received $10,000 profit out of the transaction. The purpose of the bill is to make the respondents, as partners, account to complainants for these profits. It would seem that, from complainants' refusal to reply to the respondents' letter, although the latter may have stated the trade with the Plant System differently from that actually made, the complainants did not consider themselves bound by the dealing of their alleged partners—conceding that there may be a valid partnership between the two concerns—unless the terms of the trade were favorable. This is not the way partners deal. When a partnership transaction is made, partners are absolutely bound thereby. There is no discretion about participating. The respondents' letter also plainly indicated that they did not consider the complainants concerned in the purchase until they consented to be bound. Here, then, we have the interpretation of the contract by both parties concerned, each indicating to the other and each acquiescing in the view that there was a mere agreement relating to the future, and not an actual partnership. And when we look at the nature of the agreement as detailed in the bill, we see it could mean nothing else. There was nothing contributed; nothing done at the making of the agreement, except to stipulate that

the parties, acting separately, as occasion might offer, would buy (if possible) the engines on "the best terms possible," and that when purchased on those terms, as the complainants insist, and not otherwise, they would be partnership property, and be sold as such. Who was to say, and when, that "the best terms possible" had been made? The agreement was not that the purchase should be made at all events, or at the discretion of either party, or by their joint action. But, as we have said, each of the partners was to act separately, and thus on individual account, until the other party acceded to the transaction. Thus it is made evident from the conduct of the parties, and the agreement itself, that there was no actual partnership. To constitute a partnership, there must be a "valid agreement to enter into partnership, and this contract must be executed." Parsons on Part. p. 6. Unless something is done, or unless the agreement, from its nature, operates in præsenti, the contract is executory, and either party may decline to carry it out, though liable, it may be, to a bill for specific performance or for damages at law in proper cases. 22 Am. & Eng. Enc. Law (2d Ed.) 52, and note 2; Meagher v. Reed, 14 Colo. 335, 24 Pac. 681, 9 L. R. A. 455, 460; Latta v. Kilbourn, 150 U. S. 546, 14 Sup. Ct. 201, 37 L. Ed. 1169.

We feel constrained to hold that the facts alleged in the bill do not show a partnership, and that the motion to dismiss the bill for want of equity should have been granted. In conformity with this conclusion, a decree will be here entered reversing the decree below and dismissing the bill.

BURNETT v. SNYDER.

(Court of Appeals of New York, 1879. 76 N. Y. 344.)

This action was brought to recover an indebtedness of the firm of Strang, Platt & Co., of which firm defendants were alleged to be members. Defendant Snyder, who alone appeared and answered, denied that he was a partner. Appeal from a judgment in favor of defendant Snyder.

DANFORTH, J. The question upon this appeal is whether the legal effect of the agreement entered into between the defendant Snyder, Peter O. Strang, and Ammon Platt is such that Snyder thereby became a member of the firm of Strang, Platt & Co. There is nothing else to be considered, for the referee has found, not only that Snyder was not a partner, but that he was not held out as being a partner, either by himself or by members of the firm, and, further, that the plaintiff had no belief prior to the year 1875 (several years after the debt in suit was contracted) that Snyder was a member of the firm.

These propositions were all fairly open to debate, by exceptions taken to the findings; but it is not now claimed by the appellant that there is any reason for impeaching the last two conclusions, or any

ground upon which the first can be assailed, unless it is found in the agreement above referred to. The provisions of this instrument are not all as clear and coherent as might have been expected, but it has certain unmistakable features which leave no doubt as to its proper construction.

First. It purports to be an agreement by Peter O. Strang and Ammon Platt, in their individual capacity, with C. Brown Snyder. It is dated December 31, 1869, and recites that a copartnership was on that day formed between Strang, Platt, Phillip C. Lockwood, Amasa Clark, and Ammon B. Platt, under the name of Strang, Platt & Co., that it is deemed expedient and for the interest of said firm that Snyder should have an interest and become a copartner therein, and therefore it is agreed between the parties to that paper "that C. B. Snyder is a copartner in the firm," and in consideration of the agreement and other considerations Snyder shall, and he is hereby entitled to, receive from Strang and Platt one-third of the profits earned and received by each of them from their interest in said firm; and Snyder agrees that he will pay Strang and Platt an amount equal to one-third of any losses which they, or either of them, may sustain or be chargeable with by reason of their connection, as copartners or otherwise, with the firm of Strang, Platt & Co. The parties agree to do all they can to further the interest of the firm of Strang, Platt & Co., and "at all proper times, during the continuance of this copartnership, give each other true and exact statements of the affairs and accounts of the firm." The agreement was to commence with the copartnership of Strang, Platt & Co., and to continue until the same was dissolved, as provided for in the articles of agreement.

It is, then, as the appellant contends, an agreement that "Snyder shall have an interest and become a copartner"; indeed, "that he is a copartner in the firm." Such is its language; and doubtless, if the firm of Strang, Platt & Co. had been composed of Strang and Platt alone, it would be sufficient to introduce Snyder into that firm, and clothe him with the privilege and subject him to the liability of a copartner. But that partnership itself was formed by a contract entered into, not only by Strang and Ammon Platt, but by Lockwood, Clark, and Ammon B. Platt; so that the firm was composed of five persons, of whom only two signed the instrument in question. It required the voluntary consent of all these persons to create the firm; and it seems very clear that the declarations of any number less than the whole, however emphatic, that another person was also a member, could have no effect, either upon the firm or upon that person, for the simple reason that it would be untrue. It is also clear that the declaration of Snyder could not affect the firm or himself, unless (as is not the case here) he or the firm had been trusted on account of or by reason of that declaration. This is but reiterating a principle of law, well established, that as a partnership can commence only by voluntary contract of the parties, so, when it is once formed, no

third person can be introduced into the firm as a partner without the concurrence of all the persons who compose the original firm. The consent of one or more to his introduction is not sufficient (Kingman v. Spurr, 7 Pick. [Mass.] 235; Murray v. Kneeland, 14 Johns. 318, 7 Am. Dec. 466; Marquand v. Manufacturing Co., 17 Johns. 534); for otherwise, says Story, "it would, in effect, amount to a right of one or more of the partners to change the nature and terms and obligations of the original contract, and to take away the delectus personæ, which is essential to the constitution of a partnership." Story on Partnership, § 5.

Second. It is, however, strenuously contended by the appellant's counsel that there is in this instrument an agreement that Snyder shall share the profits of the firm, and that, therefore, he became liable as copartner to pay its debts.

We cannot find that the instrument contains such an agreement. It is not there in words, nor can it be implied from the language used. He is "to receive," not from the firm, but "from Peter O. Strang and Ammon Platt," not any part or share of the profits made by the firm, but "one-third of the profits earned and received by each" of them from their interest in said firm; and in this connection we may consider that by the terms of the same agreement Snyder becomes liable for, and agrees to pay to Strang and Platt, "an amount equal to one-third of all losses," not of the firm, but "that they may sustain or be chargeable with by reason of their connection," not "as copartners" simply, but "as copartners or otherwise, with the firm of Strang, Platt & Co." We have examined all the cases referred to by the learned counsel for the appellant, and can find none which sustains his position that by such an agreement Snyder became liable for the debts of the firm. It has been seen that, in the case before us, the agreement is in terms with Strang and Platt. They are to pay the defendant one-third of the profits which they receive from their interest in the firm, and he is to pay to them an amount equal to one-third of the losses which they sustain. The cases referred to rest on contracts with a firm or an individual trader (Leggett v. Hyde, 58 N. Y. 272, 17 Am. Rep. 244), or are between persons engaged in a joint enterprise (Manhattan Brass & Mfg. Co. v. Sears, 45 N. Y. 797, 6 Am. Rep. 177; Walden v. Sherburne, 15 Johns. 409; Ontario Bank v. Hennessey, 48 N. Y. 545; Chase v. Barrett, 4 Paige, 148; Champion v. Bostwick, 18 Wend. 175, 31 Am. Dec. 376; Cushman v. Bailey, 1 Hill, 526; Catskill Bank v. Gray, 14 Barb. 471; Hodgman v. Smith, 13 Barb. 302); and all rest upon the rule, stated in Grace v. Smith, 2 Wm. Bl. 997, that he who takes a moiety of all the profits indefinitely shall by operation of law be made liable to losses, if losses arise, upon the principle that, by taking a part of the profits, he takes from the creditors a part of that fund which is the proper security to them for the payment of their debts. "This," says Eyre, C. J., in Waugh v. Carver, 2 H. Bl. 235, "was the foundation of the decision in Grace v

Smith, and I think stands upon the fair ground of reason." This covers the case of one taking profits, as such, from the partnership property or the firm, but has no relation to a case where the profits are first to be earned and received by one person before the other can have any claim upon any part thereof.

No action would lie against the firm in favor of Snyder. If the firm earned profits, Snyder could not compel a division; for in the general profits of the firm he has no interest. There is no privity between himself and the firm; and, if he sued Strang and Platt, he could recover only on showing that they had received profits. That they were earned would not be sufficient. He has no claim against the firm, or cause of action as principal. He must make out his case through Strang and Platt, and this consideration alone would seem to be a decisive answer to the plaintiff's demand; for the plaintiff claims by virtue of the agreement, and not because Snyder has done anything to induce the plaintiff to deposit his money with the firm, relying on his responsibility or his relation to the firm.

We are of opinion that the plaintiff, on the facts found by the referee, has no cause of action against the defendant Snyder, and that the judgment should be affirmed.

Judgment affirmed.[1]

[1] "Mining partnerships as distinct associations, with different rights and liabilities attaching to their members from those attaching to members of ordinary trading partnerships, exist in all mining communities. In Skillman v. Lachman, 23 Cal. 198, 83 Am. Dec. 96, * * * the Supreme Court of California * * * said that, 'whatever may be the rights and liabilities of tenants in common of a mine, not being worked, it is clear that, where several owners unite and co-operate in working the mine, then a new relation exists between them, and to a certain extent they are governed by the rules relating to partnerships. They form what is termed a "mining partnership," which is governed by many of the rules relating to ordinary partnerships, but also by some rules peculiar to itself, one of which is that one person may convey his interest in the mine and business without dissolving the partnership.' Associations for working mines are generally composed of a greater number of persons than ordinary partnerships; and it was early seen that the continuous working of a mine, which is essential to its successful development, would be impossible, or at least attended with great difficulties, if an association was to be dissolved by the death or bankruptcy of one of its members, or the assignment of his interest. A different rule from that which governs the relations of members of a trading partnership to each other was therefore recognized as applicable to the relations to each other of members of a mining association. The delectus personæ, which is essential to constitute an ordinary partnership, has no place in this mining association." Per Field, J., in Kahn v. Smelting Co., 102 U. S. 641, 645, 26 L. Ed. 266 (1880).

SECTION 2.—COMPETENCY OF PARTIES.

HOAGLIN v. C. M. HENDERSON & CO.

(Supreme Court of Iowa, 1903. 119 Iowa, 720, 94 N. W. 247, 61 L. R. A. 756, 97 Am. St. Rep. 335.)

McCLAIN, J. The nature of the controversy involved in this case, and the questions of law arising therein, will be better understood from a brief narrative of the facts as shown in the evidence: H. A. Hoaglin had been engaged in business at Mt. Pleasant, and in January, 1900, sold out his business; receiving therefor a sum in cash entirely insufficient to pay the indebtedness contracted by him in conducting his business. Being without other property or resources, he proceeded to settle with his creditors, who were pressing for payment of their respective claims, by paying to each a portion of the indebtedness; taking receipts in full for the respective claims. It does not appear that these settlements were made on any uniform basis, or in pursuance of any agreement for compensation with creditors. In some instances about one-third of the claims were paid; in other instances, more. One of these creditors was the defendant firm, and through their attorney they accepted one-third of their claim, and receipted in full for the entire amount. Thereupon H. A. Hoaglin, with his wife, who had previously been conducting a millinery business in her own name in connection with the business carried on by H. A. Hoaglin, removed to Ottumwa, and, as it is contended, entered into a contract to carry on a partnership business under the name of H. A. Hoaglin. This alleged firm was without other assets than $250 of the wife's money, and $500 borrowed by husband and wife on their joint note from the wife's sister. With this sum of money in hand, H. A. Hoaglin, without disclosing the fact that he was acting as member of the alleged firm, or that his acts were done otherwise than in his individual capacity, ordered through one Meades, the traveling agent for defendant firm, a bill of goods amounting to $1,000; paying $575 by draft delivered to said Meades, and proposing to pay the balance on time. The order contemplated the immediate shipment of the goods from defendants' place of business, in Chicago, to H. A. Hoaglin, at Ottumwa. Meades, having no authority to accept an order forwarded the order to defendants for acceptance and approval, accompanied by the draft, whereupon defendants refused to accept the order, and notified Hoaglin that they would retain so much of the money as was necessary to satisfy the balance of their previous indebtedness against him, and would pay over to him, or furnish him goods for, the surplus. Thereupon Hoaglin and wife, suing as partners, brought this action to recover from defendants the amount of money represented by the draft delivered by Hoaglin to Meades for defendants, and ap-

propriated by defendants to their own use. The suit, as originally brought, was by attachment, and notice was by publication, but defendants entered an appearance and secured the dismissal of the attachment by giving bond to pay the amount of any judgment rendered.

The case was presented to the jury in the lower court on the theory that if the evidence showed Hoaglin and wife to have been partners, and the money paid by Hoaglin to Meades to have been partnership funds, then the attempted application by defendants of the money received through Meades to the satisfaction of the individual debt of Hoaglin was improper, and plaintiffs, as partners, were entitled to recover the entire amount so paid; and counsel for appellants present the question whether husband and wife can be partners, contending that there was no lawful partnership, and that the money paid by Hoaglin was his own money, out of which defendants had a right to recoup themselves to the extent of Hoaglin's previous indebtedness to them. We shall not stop to consider the question whether the acceptance by defendants from Hoaglin of a part of his previous indebtedness, under the agreement that the entire indebtedness should thereby be discharged, constituted an accord and satisfaction, but shall proceed at once to determine whether a legal partnership between husband and wife can exist in this state.

The common-law rule that married women cannot enter into a contract of partnership seems to be based on their incapacity at common law to contract for any purpose. Collyer on Partnership (5th Am. Ed.) § 15; Parsons on Part. § 19; Weisiger v. Wood, 36 S. C. 424, 15 S. E. 597; De Graum v. Jones, 23 Fla. 83, 6 South. 925. The power of a married woman to enter into a contract of partnership, if it exists at all in any of the states in which the common-law system prevails, must depend upon statutory authority; and in several cases the question has been considered as to whether particular statutory enlargements of the powers of married women as to contracting and managing their separate property have rendered them competent to enter into partnership relations. Thus it has been held that authority to acquire, hold, and dispose of property as a separate estate will sustain a contract of partnership made by a married woman with a person other than her husband. Abbott v. Jackson, 43 Ark. 212. And undoubtedly the general power to contract which is conferred upon married women in some states would support a contract of partnership. But on the question whether the statutes extending the powers of married women with reference to the making of contracts and the ownership and disposition of separate property confer the power to enter into the relation of a business partnership with the husband, the courts seem to be somewhat at variance, not only on account of differences in terms of the statutes in which the power is conferred, but also on account of differences of opinion as to the bearing of rules of public policy. In Massachusetts it is said that authority to buy and sell and enter into contract with reference to her personal property,

to carry on trade, and to sue and be sued, does not involve power to enter into a partnership with the husband. Lord v. Parker, 3 Allen, 127. To same effect in states where the statutes give a married woman the right to control and contract with reference to her property, see Payne v. Thompson, 44 Ohio St. 192, 5 N. E. 654; Fuller v. McHenry, 83 Wis. 573, 53 N. W. 896, 18 L. R. A. 512; Haas v. Shaw, 91 Ind. 384, 46 Am. Rep. 607; Artman v. Ferguson, 73 Mich. 146, 40 N. W. 907, 2 L. R. A. 343, 16 Am. St. Rep. 572; Gwynn v. Gwynn, 27 S. C. 525, 4 S. E. 229; Gilkerson-Sloss Commission Co. v. Salinger, 56 Ark. 294, 19 S. W. 747, 16 L. R. A. 526, 35 Am. St. Rep. 105. In other states, statutes to substantially the same effect have been held to so far enlarge the legal capacity of a married woman as to authorize her not only to enter into a partnership contract in general, but specifically to enter into such contract with her husband. Toof v. Brewer (Miss.) 3 South. 571; Suau v. Caffe, 122 N. Y. 308, 25 N. E. 488, 9 L. R. A. 593. It has been held, however, that where the statutes not only confer the right to own and contract with reference to her separate property, but also the general power to contract, the wife may not only enter into business partnership relations in general, but also specifically with her own husband, and this is said not to be contrary to any dictate of public policy. Burney v. Grocery Co., 98 Ga. 711, 25 S. E. 915, 58 Am. St. Rep. 342; Lane v. Bishop, 65 Vt. 575, 27 Atl. 499. And see Bernard & Leas Mfg. Co. v. Calvin, 12 C. C. A. 123, 64 Fed. 309.

The question of public policy involved in these statutory enlargements of the powers and liabilities of married women must be determined with reference to the general tenor of the statutory provisions on the subject as they have been found in the different states. In this state, under the provisions of Code, §§ 3153, 3164, which give to married women the right to acquire, own, and dispose of property in the same manner and to the same extent as their husbands may do, and to make contracts and incur liabilities which may be enforced by or against them to the same extent and in the same manner as if they were unmarried, it is not open to question that a wife may become surety for her husband, and be liable generally on such contract of suretyship, may become the general creditor of her husband, may be joint owner of property with him, and may be his agent, or may make him her agent, in the transaction of business. Citation of authorities to support these propositions would be wholly unnecessary. These unquestioned powers of a married woman in this state to deal with her husband would seem to cover all the powers and liabilities involved in entering into or continuing the relation of partner with her husband. The essential characteristics of a partnership seem to be joint ownership of property, and authority of each partner to bind the other partners by his acts with reference to the partnership property, and also to impose upon the other partnership liability. As these relations may be separately sustained between husband and wife, we

see no reason why they may not be collectively created by entering into and carrying on the relation involved in the formation of the entity known as a partnership. The only objection which occurs to us is that involved in the denial of the capacity of husband or wife to maintain a suit in a court of law or equity against the other, except as such power is expressly conferred, as decided in Heacock v. Heacock, 108 Iowa, 540, 79 N. W. 353, 75 Am. St. Rep. 273, in which we have held that the relations of husband and wife to each other are such as to preclude a suit by the one against the other for breach of contract or for tort, unless it be for the preservation or protection of the separate property; and it is argued that this inability of the wife to sue the husband would preclude the existence of a business partnership arrangement between them. But we do not think that the conclusion follows. The same argument would lead to the result that a valid contract cannot be made between them, such as a contract for the repayment of money advanced by one to the other; and yet, as we have suggested, that is not the law of this state, and there is no intimation in the Heacock Case that it was intended by that decision to declare that such contracts are necessarily invalid. It, no doubt, might at one time have been reasonably argued that, inasmuch as a right of action by the wife against the husband was denied to her, she was not competent to voluntarily enter into contract or joint property relations with him, such as would involve for their protection a general right to sue. But the time for that argument is past. The right to contract with the husband is now so well established that it would be inexcusable to say that its existence is negatived by a holding that public policy forbids a suit by the wife against the husband on account thereof. It may well be suggested, also, that there is express authority for a suit by the wife against the husband to recover her property, or any right growing out of the same (Code, § 3155), and therefore that, as the wife may at any time terminate any business partnership relation which may exist with her husband, and thereby become practically a joint owner only with him in the partnership property, there would seem to be no impossibility of sustaining an action by her against him for any right growing out of their joint ownership. In short, we think that, in view of the statutory provisions extending the legal powers and rights of married women, we cannot say that there is any public policy recognized in this state which precludes the existence of a business partnership relation between husband and wife. None of the cases holding that such relation cannot exist are applicable to a condition of affairs as to the wife's capacity to make general contracts, and own and control her own property, such as exists in this state, except that of Seattle Board of Trade v. Hayden, 4 Wash. 263, 30 Pac. 87, 32 Pac. 224, 16 L. R. A. 530, 31 Am. St. Rep. 919, and Haggett v. Hurley, 91 Me. 542, 40 Atl. 561, 41 L. R. A. 362, and we find ourselves unable to indorse the views expressed in these cases. Our conclusions find support not only in the

cases already cited, but also in Belser v. Banking Co., 105 Ala. 514, 17 South. 40; Schlapback v. Long, 90 Ala. 525, 8 South. 113; Fuller v. Ferguson, 26 Cal. 546; In re Kinkead, 3 Biss. (U. S.) 405, Fed. Cas. No. 7,824; Clark v. Hezekiah (D. C.) 24 Fed. 663; Snell v. Stone, 23 Or. 327, 31 Pac. 663. * * *

After considering all the questions raised in behalf of appellants, we reach the conclusion that the judgment of the trial court should be affirmed.

SHIRK v. SHULTZ.

(Supreme Court of Indiana, 1888. 113 Ind. 571, 15 N. E. 12.)

Suit by appellant, Milton H. Shirk, an infant, by his next friend, Mary Shirk, for appointment of a receiver to take charge of the assets of the firm of which he was a partner, and after converting them into money to first pay him the amount invested by him therein, and apply the balance to the payment of the firm debts.

Zollars, J. Appellant alleges in his complaint that in October, 1884, when he was a minor, he entered into partnership with appellee for an indefinite time, in the business of upholstering and dealing in furniture, under the firm name of Shirk & Shultz; that he still is a minor; that he invested in the business, $500; that the firm has on hand furniture and goods of the value of $850, and is in debt over $600; that "he is advised by his guardian to renounce such partnership, and withdraw from said firm, and he hereby renounces such arrangement, and asks to avoid, annul, and undo all of his obligations in that behalf"; that Shultz is insolvent, and that the firm creditors will exhaust the assets of the firm, unless a receiver shall be appointed to take charge of them, etc. The prayer is for the appointment of a receiver to take charge of the assets of the firm, and convert them into money, and pay, first, to appellant the amount invested by him, and, second, the firm debts. The court made a special finding of facts, in substance, that in October, 1884, Shirk & Shultz entered into partnership, and continued in business until the commencement of this action, in August, 1885. Shirk is a minor and has a guardian. He entered into the partnership, and put into the business $271.40, with the consent of his guardian. Of that amount, $74.50 was paid to Shultz, to be used in the purchase of goods for the firm, and it was so used. The balance of the $271.40 was paid by Shirk on the debts of the firm, for goods, and labor of employés. During the existence of the firm, Shirk drew out $100. Shultz put into the business $260, and drew out nothing. The assets of the firm, at the time this suit was commenced, amounted in value to $800, and its debts aggregated $700. Shultz is insolvent. Upon the facts so found, the court below concluded, as a matter of law, that the firm should be dissolved, and that a receiver should be appointed to take charge of the firm assets, con-

vert them into money and pay, first, the costs of this suit; second, the firm debts, and third, divide the surplus, if any, between the partners. A receiver was accordingly appointed. Appellant excepted to the conclusions of law, and contended, and still contends, that, upon the facts found by the court, he is entitled to have refunded to him, from the assets of the firm, the amount which he invested, in preference to the partnership creditors and all others. Whether or not he is so entitled is the one question for decision.

The facts in the case of Dunton v. Brown, 31 Mich. 182, were these: Dunton, a minor, entered into partnership with Brown, and put about $100 into the business. After the business had been continued for about three months, Dunton informed Brown that he would no longer continue as a partner, and that if he remained any longer, he must be paid for his services. To that, Brown would not consent. Dunton went away for a while, but subsequently returned and continued for nine months. After leaving again, he brought an action to recover back the $100 with interest, and for his services. It was held that he could not maintain the action. In speaking of the partnership agreement, it was said: "It is at best only voidable; and we have found no authority which enables the infant or his guardian to determine whether a voidable contract shall be affirmed or annulled while the infancy continues. It appears to be a matter for his own decision when he arrives at mature age. * * * And it is worthy of consideration whether, inasmuch as the partnership business continued and ended before suit, and before majority, it does not come within the rule which protects executed contracts in many cases. Squier v. Hydliff, 9 Mich. 274. Without deciding what may happen when the infant reaches majority, we think it impossible to sustain an implied assumpsit now, against the terms of the only agreement ever made, which was certainly not a nullity."

In the case of Bush v. Linthicum, 59 Md. 344,[1] one partner brought a suit for the dissolution of the firm, and the appointment of a receiver to take charge of the firm assets, and pay the firm debts, etc. In bar of the suit, the other partner interposed the plea of his infancy. In the decision of the case, after citing and approving the Michigan case above and the case of Armitage v. Widoe, 36 Mich. 130, which followed it, the court said: "Having formed this partnership, he cannot so far repudiate it during his minority as to escape such consequences of partnership as do not involve personal liability for claims

[1] In disposing of this case in the circuit court, Miller, J., said: "All the books upon partnership lay down the proposition that an infant may become a partner with an adult. It is a contract not absolutely void, but one which the infant may stand to or repudiate, at his election. While he remains a partner he has the rights and powers of a partner. He has equal right with his copartner to the possession of the assets of the firm, to collect the debts due it, and he has also the power to contract debts in the name of the firm, which, though he may himself subsequently repudiate, and get rid of personal responsibility, therefor, are still binding on his copartner."

against the firm, or costs incident to the legal settlement of its affairs. Such partnership must be dissolved as any other; and the partnership assets must be assignable to partnership creditors. What his rights may be as against his adult copartner, when he reaches majority, we do not decide."

The case of Kitchen v. Lee, 11 Paige (N. Y.) 107, 42 Am. Dec. 101, frequently cited by text-writers, was this: Kitchen and Lee were partners. During the existence of the partnership, they contracted debts as partners. Kitchen retired from the business, and relinquished to Lee the goods of the firm, upon the condition that he would pay, or procure to be paid, the debts then due from the firm, and indemnify him, Kitchen, against the same. Previous to the retirement of Kitchen from the firm, Lee represented to him that he was 21 years of age. Subsequent to the dissolution of the firm, Lee refused to pay the firm debts, upon the ground that he was a minor, and not legally liable to pay such debts; and made a pretended sale of the goods to Price, who paid no consideration, and took them with knowledge of the facts that the firm debts were not paid, and that the sale to him was fraudulent as against Kitchen. Stating the above facts in his bill, Kitchen prayed for the appointment of a receiver to take charge of the goods and apply them to the payment of the partnership debts. To the bill Lee pleaded that at the time of making the agreement to pay the firm debts he was a minor, and that Kitchen had notice of that fact. Walworth, Chancellor, held that the contract on the part of Lee to pay the debts was one which he might affirm or repudiate, at his election; but that he could not be permitted to retain all the partnership effects, and at the same time refuse to perform the condition upon which Kitchen's interest in the effects of the firm was to become his property; that if Lee elected to rescind the agreement made, upon the retiring of Kitchen from the business, the latter had a right to insist that his interest in the copartnership effects should be applied to the payment of the debts in the same manner as if the dissolution had not taken place. It was further said: "The rule of law on the subject is that an infant cannot be permitted to retain the property purchased by him, and at the same time repudiate the contract upon which he received it. * * * If the goods in this case had belonged to the complainant (Kitchen) exclusively, at the time of the agreement, and the infant had repudiated his agreement when he became of age, trover or replevin would have been the proper remedy for the goods, if they remained unchanged. Badger v. Phinney, 15 Mass. 359, 8 Am. Dec. 105. But, this being copartnership property, previous to the agreement, the only remedy of the complainant was in this court; and this plea of infancy is not a full defense to the case made by the bill."

In the case of Moley v. Brine, 120 Mass. 324, three persons, one of whom was a minor, were partners, and put into the business different amounts. It was held that, upon a dissolution of the partnership,

the assets, upon a settlement of its business, being less than the amount contributed by all to the common stock, should be divided among the partners, according to the amount of their contributions, and that the deficiency and loss should be borne by the partners in the same proportion in which they were to bear profits and losses; in other words, that the minority of one of the partners gave him no advantage in the particulars named. Of him it was said: "He actually entered into the partnership, had the benefits of it while it lasted, and drew out the greater part of his contribution. The assets remaining at the time of the dissolution being insufficient to pay the claims of all the partners, the loss of capital must fall upon the three partners in equal proportions, and the infant cannot throw upon his copartners the obligation of making up the deficiency."

In the case of Furlong v. Bartlett, 21 Pick. (Mass.) 401, one of the partners made a general assignment in the name of the firm, of all the partnership property, in trust for the payment of the debts of the company, and delivered the property to the assignee. The other partner, who was a minor, ratified the assignment, but, on coming of age, brought an action against the assignee for the alleged unlawful taking and asportation of the property. It was held that trespass would not lie. In the decision of the case, it was said: "The court entertains strong doubts whether, under the peculiar circumstances of this case, any action will lie, or whether the plaintiff has any remedy, unless for his share of the balance, if the partnership should be ultimately solvent; but of this, as it is not now before the court, they express no opinion."

The case in 120 Mass. 324, is based upon the proposition that where an infant has enjoyed the benefits of that for which he paid his money, he cannot recover back the money. In support of the conclusion reached, the court cited Breed v. Judd, 1 Gray (Mass.) 455; Holmes v. Blogg, 8 Taunt. 508; Aldrich v. Abrahams, Hill & D. 423; Medbury v. Watrous, 7 Hill (N. Y.) 110; Heath v. Stevens, 48 N. H. 251. The case of Breed v. Judd was based, really, upon two propositions: First, that, in order to rescind a contract, an infant must place the other party in statu quo; and, second, that an infant cannot rescind an executed contract where he has enjoyed the benefits of it. The ground of the judgment in the case of Holmes v. Blogg was that the infant had received something of value for the money he had paid, and that he could not put the other party in the same position as before. For those reasons it was held that the infant could not recover back the money he had paid on a lease. In Aldrich v. Abrahams it was said: "It has been holden that by avoiding an executory contract, the infant only cancels his obligation to perform it. He does not acquire the right to recover back what he had paid, or for services which he had rendered, under the agreement while it remained in force. In the case of Medbury v. Watrous, the court indorsed the doctrine that where an infant pays money on a contract, and enjoys the benefit of

it, and then avoids it, he cannot recover back the consideration paid; but suggested that if he has but partially enjoyed the benefits of the contract, he ought to be allowed to recover the difference. It was announced as the law, in the case of Heath v. Stevens, that an infant, upon rescinding an executed contract, may recover for what he has done or paid under it, provided he restore or account for what he has received under the contract.

It will be observed that the decision in the Michigan case above cited, is based upon the proposition that an infant cannot disaffirm a partnership agreement during his minority. The reasoning in that case was adopted in the Maryland case. The decision in the case in Paige was based largely upon the proposition that an infant cannot be permitted to retain the property purchased by him, and at the same time repudiate the contract upon which he purchased it. It may be said of most, if not of all, the propositions upon which the decisions in the cases cited are based, that they have not been regarded as the law in this state. We have stated them for the purpose of determining whether or not the conclusions in those cases may be regarded as correct, notwithstanding the propositions upon which they rest may be regarded as incorrect. The holdings by this court have been that all voidable contracts by an infant in relation to personal property may be disaffirmed by him during minority. Carpenter v. Carpenter, 45 Ind. 142; Indianapolis Chair Mfg. Co. v. Wilcox, 59 Ind. 429, and cases there cited; Ayers v. Burns, 87 Ind. 245, 44 Am. Rep. 759, and cases there cited; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53, and cases there cited, including cases by the Supreme Courts of Vermont, Massachusetts, and New York. In support of the right of infants to disaffirm such contracts during minority, see, also, Tyler, Inf. (2d Ed.) 70, 72, and cases there cited; Schouler, Dom. Rel. § 409; 1 Lindl. Partn. 83. The Supreme Court of Maryland, since the case above cited from that court, has held that an infant may thus disaffirm during minority. Adams v. Beall, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379. And so it has been the holding of this court that, in order to disaffirm and maintain an action during minority for his property or for money paid on a voidable contract, it is not necessary for the infant to return what he has received, or to place the other party in statu quo. Pitcher v. Laycock, 7 Ind. 398, and cases there cited; Miles v. Lingerman, 24 Ind. 385; Briggs v. McCabe, 27 Ind. 327, 89 Am. Dec. 503; Towell v. Pence, 47 Ind. 304; Carpenter v. Carpenter, supra; White v. Branch, 51 Ind. 210. The statute of 1881 has changed the rule as to real estate, but that change is not material here. Section 2945, Rev. St. 1881. And so, upon ample authority, this court has repudiated the doctrine that "if an infant advances money on a voidable contract, which he afterwards rescinds, he cannot recover this money back, because it is lost to him by his own act; and the privilege of infancy does not extend so far as to restore this money, unless it was obtained from him by fraud."

House v. Alexander, 105 Ind. 109, 4 N. E. 891, 55 Am. Rep. 189, and cases there cited.

The cases thus reviewed lend aid to the proposition that, in the case before us, appellant cannot, through the instrumentality of the court exercising equitable powers, and the receiver appointed by it, have the assets of the firm appropriated in the way of refunding to him what he invested in the business, and thus leave the firm creditors wholly or partially unpaid. And, so far as they sustain that proposition, we approve of them, although disapproving, in the main, the reasoning upon which they rest. Had appellant purchased the goods on his own account, and paid for them, he might have disaffirmed the contract, and recovered the amount paid, without first returning, or offering to return, them to the person from whom he purchased them. It does not follow from that, however, that, after having thus disaffirmed the contract, he could, nevertheless, hold the goods as against the person from whom the purchase was made. He would not be allowed to retain the goods after having thus recovered what he paid for them. When an infant thus repudiates a contract, he repudiates it for all purposes. He cannot repudiate it so as to escape payment for an article purchased, and still hold the article as against the person from whom the purchase was made. As was said in the case in Paige, supra, when a contract is thus repudiated, the vendor may have his action to recover the goods from the infant, if they remain in his hands unchanged. And so, if appellant had purchased the goods on his own account, he might have disaffirmed the contract, and refused to pay for them, without returning or offering to return them to the vendor. But, after having thus disaffirmed the contract, and refused to pay, he could not hold the goods as against the vendor. See Kitchen v. Lee, supra; Rice v. Boyer, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53. What he could not do otherwise, he certainly cannot accomplish through a court of equity. Having gone into court, and asked that the assets of the firm should be taken charge of by it through a receiver, he must be held to have consented that the court shall deal with them and the rights of all concerned as the law and equity may require. Having thus invoked the interposition of the court, he must be held to have consented that it shall close out the business, so as to settle the ultimate rights of the parties. If it be said that his disaffirmance of the contract is such as would otherwise have relieved him from the obligation to pay for the goods, then the court having charge of the goods has the right to see to it that they, or the money that may be realized from the sale of them, shall be returned to vendor.

In our judgment, however, appellant's course has been such as to ratify the purchase of the goods, and all that has been done by the firm. He states in his bill that he "renounces the partnership arrangement, and asks to avoid and annul all of his obligations in that behalf"; but, at the same time, he treats the goods and assets on hand as part-

nership assets, and asks the court to take charge of and deal with them as such. His disaffirmance puts an end to the contract by which he became a member of the firm; but by asking the court to take charge of the goods as assets of the firm, as to them, he not only does not disaffirm, but ratifies all that was done in the purchase of them. As to them, he cannot disaffirm, and, at the same time, treat them as partnership assets. Having treated them as assets of the firm by asking the court to deal with them as such, the court will deal with them as partnership assets, as in any other case, and apply them first to the payment of the debts of the firm. 2 Lindl. Partn. *1040. This is not an action against the other party to recover a personal judgment against him for the amount paid into the business by appellant. What might be the rights of the parties in such an action, we do not decide. It is sufficient here that, in our judgment, the conclusions of law by the court below upon the facts found were correct, and the proper decree was entered.

Judgment affirmed.

MERCHANTS' NATIONAL BANK v. WEHRMANN et al.

(Supreme Court of Ohio, 1903. 69 Ohio St. 160, 68 N. E. 1004.)

This was an action by William F. Wehrmann against the Merchants' National Bank and others to establish a partnership liability on the part of the bank with a certain Elsmere Syndicate, for debts incurred in the operations of such syndicate. The court below found the bank liable. A petition in error was filed by the bank to reverse this judgment.

BURKET, C. J. The Merchants' National Bank of Cincinnati is a corporation organized under the national banking laws of the United States, and the Elsmere Syndicate was a partnership consisting of forty shares, each partner holding one or more shares, and each share evidenced by a certificate, as shown in the foregoing statement of facts, and which certificates were transferable on the books of the syndicate; and such transfers were intended to make the transferee a partner in the syndicate, instead of the transferror, without a dissolution of the partnership. The circuit court finds that the bank became owner by transfer of nine shares of this syndicate or partnership, which shares were taken by the bank to secure the payment of a large indebtedness owing to said bank for loans by it made to one of its customers in the usual course of business. The bank, in accepting said transfer, evidently regarded it as a collateral; but it so treated the shares, and so transacted the business as to said shares, that the circuit court found that the bank became the owner of the shares, and there was evidence warranting such finding. The case must therefore be determined upon the theory that the bank held the shares as owner, and not merely as collateral—the purpose of such ownership,

however, being to secure the ultimate payment of said indebtedness out of the proceeds of said shares; and, to that end, it was necessary that the property of said syndicate should be put into such condition as to yield the most money, and this is what the trustees of the syndicate attempted to do; and, in so doing, debts were incurred, which the syndicate was unable to pay, and, after all its property had been consumed in paying said debts, a large debt still remained. * * *

But conceding that a national bank may take shares in another bank as collateral security for a new loan, or to secure the payment of an old one, and that it may become the owner of such shares in attempting to realize on such collateral, and that it may thereafter be liable to creditors on its individual liability as such shareholder, yet that falls far short of holding a national bank liable as a partner in a partnership, and liable as such partner for not only its own share of the debts of the firm, but also the debts of its copartners. The individual lilability of a holder of shares in a national bank is in its nature several, and not joint (United States v. Knox, 102 U. S. 422, 26 L. Ed. 216), while the liability of a partner for partnership debts is, as to creditors, usually held to be joint; but some cases hold it to be joint and several.

The individual liability is an inseparable incident to national bank shares, for which the lawful holder is liable; but this liability is his own debt, and attaches to a specific several article of his property—the share of stock—and is therefore limited, and cannot exceed the face value of the stock. But in the case of shares in a partnership, the liability of a partner is not for a specific amount adhering to his share as an incident, and limited to a certain amount; but the only limitation is the whole indebtedness of the firm, and which in many cases would far exceed the entire resources of the bank, and drive it into insolvency. The purpose of allowing a national bank to take collateral security is to enhance its solvency, and not to permit it to enter into wild speculations as a partner under the pretext of enforcing its rights as a pledgee or owner. "It is settled that the United States statutes relative to national banks constitute the measure of the authority of such corporations, and that they cannot rightfully exercise any powers except those expressly granted, or which are incidental to carrying on the business for which they are established. Logan County Bank v. Townsend, 139 U. S. 67, 73, 11 Sup. Ct. 496, 498, 35 L. Ed. 107." California Bank v. Kennedy, 167 U. S. 362, 366, 17 Sup. Ct. 831, 833, 42 L. Ed. 198.

To become a member of a partnership in any manner or for any purpose is not incidental to carrying on the business for which national banks are established, and is certainly not expressly granted. The power, therefore, does not exist. The liabilities for which a national bank must respond are such only as are created or incurred by its officers, acting in the capacity of officers of the bank alone, and not in connection with other trustees or officers of other companies. Were

it otherwise, the other trustees or officers might outnumber the officers of the bank, and impose a burden on the bank which would ruin it; and thus the bank would be controlled, not by its officers, but by outsiders. The officers of a bank cannot delegate their powers to others. It is therefore clear that a national bank cannot be a partner in a copartnership, and cannot incur a partnership liability. The same has been held as to coporations in this state. Geurinck v. Alcott, 66 Ohio St. 94, 63 N. E. 714. The first subdivision of the syllabus was omitted by mistake of printer, but is found in the headnote, and also in the index, and is as follows: "A corporation cannot be a member of a partnership." * * *

Judgment reversed.

SECTION 3.—FORMALITIES.

MARSH v. DAVIS et al.

(Supreme Court of Kansas, 1885. 33 Kan. 326, 6 Pac. 612.)

HORTON, C. J. This was an action for the dissolution of a partnership, and for an accounting. The evidence conduced to show: That prior to March 12, 1875, there existed at Iola, in this state, a firm, composed of W. E. Davis, George S. Davis, and Elias Bruner, engaged in the milling business under the name of W. E. Davis & Co. That the firm were then the owners of a grist and saw mill, and certain personal property, and tracts of land, all used for partnership purposes, and in connection with the mill. That on March 12, 1875, it was verbally agreed between the members of the firm that the plaintiff should be taken into the partnership as a member thereof, on the following terms: All the property of the partnership was valued at $12,000; each partner was to have an equal share therein; the plaintiff was to pay $3,000, but it was understood "that he was to have his share in the partnership without interest on this sum until such a time as the proceeds of the mill or business made it." That it was further agreed among all the members that the partnership should be consummated by an entry in the journal and ledger books, setting forth that the parties had associated themselves together as partners, and the amounts invested by each member were to be shown by his credits on the ledger. That the entries upon the journal and ledger were made in accordance with this agreement. That on March 13, 1875, the plaintiff was permitted to go in possession jointly with the other parties. That all the parties acted on the agreement until about the middle of November, 1882. That the partnership after March 13, 1875, continued to do business under the firm name of W. E. Davis

& Co. That it was the particular duty of plaintiff to keep the books of the firm, and look after such other business as he could. That at the formation of the new partnership on March 12, 1875, the grist-mill was somewhat dilapidated, and was not making good flour. That the sawmill was very old, and pretty well worn out. That W. E. Davis and G. S. Davis were brothers. That the wife of plaintiff was the sister of W. E. and G. S. Davis, and also the sister of the wife of Elias Bruner. That the plaintiff kept the books, and also collected for the firm, borrowed money, brought suits against different parties, and did almost everything that was to be done to further the interests of the firm. That the defendants allowed him to hold himself out to the public as a partner, to sign the firm name to negotiable paper, subscriptions to public enterprises, and officials' bonds, to bring suits, and defend suits, as a partner. That land was condemned for a mill-dam. That plaintiff paid the money therefor from the proceeds of the business. That a dam was constructed across the Neosho river, where the mill is now located. That the old mill was taken down and moved to the new location in the spring of 1880. That a new mill was made out of it; that is, the old mill was rebuilt, and considerable new machinery put in it. That the expense of doing this was over $4,000. That about $1,500 was borrowed. That the balance of the money was paid from the proceeds of the mill. That the defendants accepted $110 they owed him prior to March 12, 1875, as part payment of the $3,000, and used it in the partnership business. That the plaintiff also paid between $50 and $60 upon the purchase price of his interest in the firm after he became a member thereof. That during the partnership he drew out $1,900. That about the middle of November, 1882, plaintiff was excluded by the defendants, without any good reason or excuse, from further participation in the partnership, and was forbidden by the other partners from exercising any rights or control over the partnership business or property. That at the time of such exclusion the property of the firm was worth about $30,000, having increased from $12,000 in 1875 to $30,000 in 1882.

After the introduction of all the evidence, on the part of the plaintiff, that the court would admit, the defendants interposed, and filed a demurrer thereto, upon the ground that no cause of action was proved. The court sustained the demurrer, and plaintiff excepted. This is the important ruling complained of. To sustain this ruling, the defendants contend that the contract of March 12, 1875, being for an interest in real estate, is, as to such real estate, void, under the statute of frauds; and that, being void as to the real estate, it is also void as to the personal property, and the right to become a partner, which, as defendants allege, were parts of an entire and indivisible contract. The proposition is conceded by the defendants, that where real estate is purchased with partnership funds, for partnership purposes, after the partnership has been formed, such real estate is

to be treated as part of the partnership property, and, as a consequence, personal estate. It is also well settled "that parol testimony is admissible to prove a resulting trust in relation to real estate, and that land purchased in the name of one partner, for the use and benefit of the firm, raises a resulting trust which will be enforced." Story, Eq. Jur. §§ 1206, 1207; Scruggs v. Russell, 1 McCahon, 39.

These principles are applicable to this case and decisive against the defendants. When the plaintiff was taken into the partnership of W. E. Davis & Co., on March 12, 1875, as the firm was then in existence, and in the possession of real estate purchased for partnership purposes, and then appropriated to those purposes, such real estate was partnership property, and the plaintiff, by acquiring an interest in the partnership by verbal contract, and thereafter having acted under the contract as one of the partners, with the consent of all the members, is not to be deprived of his interest in the partnership, either as to the personal property or real estate, on account of the statute of frauds. The cases establish that a partnership in any branch of trade or business may be shown by parol as an existing fact, and that whatever real estate is held for the purpose of such business is regarded as an incident thereto, and the law will imply a trust in favor of the partnership, however the lands be held in law. For an illustration: If a mercantile firm carrying on the business of buying and selling goods, and as an incident to the business owning and having in possession the building in which the business is transacted, takes into the partnership another person, who purchases an interest in the partnership, and, as a partner, is let in possession of the partnership property, and all the parties act on the agreement, such person is not to be deprived of his right in the real estate held by the firm at the time he became a member thereof because his agreement with the other partners was not in writing. If the partnership be proved, that will suffice to establish a partnership trust in the land intended and treated by all the partners as partnership property, however the land be held; and this will not be incompatible with the conditions of the statute of frauds. Scruggs v Russell, supra; 1 Lindl. Partn. 87–90; Bird v. Morrison, 12 Wis. 138; Borden v. Whaling Co., 10 Cush. (Mass.) 458; Browne, Frauds, §§ 259–263.

We think it is immaterial whether the real estate in this case was bought with partnership funds, for partnership purposes, after the formation of the partnership, or whether a part of the real estate was put into the firm as partnership property at the formation of the new firm on March 12, 1875, if the parties have acted on the agreement and become partners. In such case, the statute of frauds ceases to be applicable. Smith v. Tarlton, 2 Barb. Ch. (N. Y.) 336; Bissell v. Harrington, 18 Hun (N. Y.) 81.

The judgment of the district court will be reversed, and the cause remanded for further proceedings in accordance with the views herein expressed.

EARL, C., in CHESTER et al. v. DICKERSON et al.

(Commission of Appeals of New York, 1873. 54 N. Y. 1, 13 Am. Rep. 550.)

It cannot be questioned that two or more persons may become partners in buying and selling land. There is nothing in the nature or essence of a partnership which requires that it should be confined to ordinary trade and commerce, or to dealings in personal property. Story on Part. §§ 82, 83; Collyer on Part. §§ 3, 51, and note; Dudley v. Littlefield, 21 Me. 418; Sage v. Sherman, 2 N. Y. 417; Mead v. Shepard, 54 Barb. 474; Pendleton v. Wambersie, 4 Cranch (U. S.) 73, 2 L. Ed. 554; Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. Ed. 736; Hoxie v. Carr, 1 Sumn. (U. S.) 173, Fed. Cas. No. 6,802, Kent says: "A partnership is a contract of two or more persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, and to divide the profit and share the loss in certain proportions; and it is not essential to a legal partnership that it be confined to a commercial business. It may exist between attorneys, conveyancers, mechanics, owners of a line of stagecoaches, artisans, or farmers, as well as between merchants and bankers." 3 Kent, Com. 24, 28. And why may it not exist between dealers and speculators in real estate?

But, as it is claimed that the partnership in this case existed by parol before the execution of the written agreement dated November 28, 1864, it is necessary to inquire whether a partnership, in reference to lands, can be formed and proved by parol. Upon this question there is considerable conflict in the authorities. On the one hand, it is claimed that a parol agreement for such a partnership would be within the statute of frauds, which provides that no estate or interest in lands shall be created, assigned, or declared, unless by act or operation of law, or by a deed or conveyance in writing subscribed by the party creating, granting, assigning or declaring the same; and to this effect is the case of Smith v. Burnham, 3 Sumn. (U. S.) 435, Fed. Cas. No. 13,019. On the other hand, it is claimed that such an agreement is not affected by the statute of frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer all the partnership property, whether it be real or personal, and in such cases will not allow the partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the statute of frauds; and to this effect are the following authorities: Dale v. Hamilton, 5 Hare, 369; Essex v. Essex, 20 Beaven, 449; Bunnell v. Taintor, 4 Conn. 568. A full discussion of the question is found in Dale v. Hamilton, and the reasoning and review of the cases there by Vice Chancellor Wagram are quite satisfactory. The general doc-

trine is there laid down that "a partnership agreement between A. and B. that they shall be jointly interested in a speculation for buying, improving for sale, and selling lands may be proved without being evidenced by any writing, signed by or by the authority of the party to be charged therewith within the statute of frauds; and, such an agreement being proved, A. or B. may establish his interest in land, the subject of the partnership, without such interest being evidenced by any such writing." I am inclined to think this doctrine to be founded upon the best reason and the most authority. But whether it is or not it is not very important to decide in this case. Most of the conflict in the authorities has arisen in controversies about the title to the real estate after the dissolution of the partnership or the death of one of the partners. But suppose two persons, by parol agreement, enter into a partnership to speculate in lands, how do they come in conflict with the statute of frauds? No estate or interest in land has been granted, assigned, or declared. When the agreement is made no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve, and sell lands. While they are doing this, do they not act as partners, and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute. The statute is not so broad as to prevent proof by parol of an interest in lands. It is simply aimed at the creation or conveyance of an estate in lands without a writing. If there was a parol agreement in this case before the written one, it was just like the one embodied in the writing, to wit, a partnership to purchase, lease, and take refusals of land, and then sell, lease, or work them for the joint benefit of the parties. This is not a controversy about the title to any of the lands taken or owned by the partners, but it simply relates to the conduct of the defendants while they were acting as partners; and in such a case the statute of frauds certainly can present no obstacle to relief.[1]

COLEMAN v. EYRE.

(Court of Appeals of New York, 1871. 45 N. Y. 38.)

RAPALLO, J. The plaintiff was interested to the extent of one-fourth in the profits or losses of a shipment of coffee undertaken by him jointly with other parties. After the adventure had been begun, and before the coffee had reached its port of destination, it was mutually

[1] "A contract forming a partnership to be continued beyond one year is within the section of the statute of frauds which provides that every agreement which by its terms is not to be performed in one year from the making thereof is void unless it is in writing, and a partnership so formed is a partnership at will. Morris v. Peckham, 51 Conn. 128; Williams v. Jones,

agreed between the plaintiff and the defendant that the latter should have one-half interest in the plaintiff's one-fourth interest in the adventure. The speculation resulted in a loss, and this action was brought to recover one-half of the plaintiff's proportion of such loss. It is now claimed on the part of the defendant that no valid contract was made between him and the plaintiff; that inasmuch as the plaintiff had embarked in the speculation before and without reference to any arrangement with the defendant, and the defendant had not done or contributed anything to aid in the joint enterprise, there was no partnership, and no consideration for the undertaking of the plaintiff to give him one-half of the profits; that therefore the defendant could not have enforced payment of half the profits if the adventure had been successful, and consequently no agreement on his part to contribute to the loss can be implied.

This argument assumes that the agreement was simply that the defendant should have one-half of the profits which the plaintiff might make out of the adventure in case it should prove successful. But such was not the agreement proved. The agreement was that the defendant should share with the plaintiff in the adventure, and it seems to have been clearly understood that he should participate in the result, whether it should prove a profit or a loss. That it might result in a loss was contemplated by the parties. There is evidence in the case that the possibility of that event was the subject of conversation between them at the time of making the contract; that the hope was then expressed that the plaintiff would not be compelled to call upon the defendant to contribute to a loss; and that afterward, when they did call upon him to contribute, he did not dispute his liability, but sought to reduce the amount by claiming a portion of the plaintiff's commissions.

The evidence fully justified a finding that, in consideration of the agreement by the plaintiff to account to the defendant for half the profits in case of success, the defendant undertook to bear half the loss in the contrary event; and the intendment is that the referee did so find. Indeed, such is a proper construction of the actual finding. It is a clear case of mutual promises; and the obligation of each party was a good consideration for that of the other. Briggs v. Tillotson, 8 Johns. 304.

The agreement was not within the statute of frauds. It was not an agreement for the sale of any personal property or chose in action, but an executory agreement, whereby one party undertook to bear one part of a possible loss in consideration of a share of an expected profit.

5 B. & C. 108; Jones v. McMichael, 12 Rich. Law (S. C.) 176; Essex v. Essex, 20 Beav. 442; Burden v. Barkus, 3 Giff. 412; 4 De G. F. & J. 42, 47, 50; Reed's Stat. Fr. § 191; Lind. on Part. (25th Eng. Ed.) 80, 81." Per Follett, C. J., in Wahl et al. v. Barnum et al., 116 N. Y. 87, 97, 22 N. E. 280, 5 L. R. A. 623 (1889). But see Shropshire v. Adams (Tex. Civ. App.) 89 S. W. 448 (1905), contra.

The judgment of reversal and order granting a new trial should be reversed, and the judgment for the plaintiff entered on the report of the referee should be affirmed, with costs.

Order of General Term reversed.

SECTION 4.—FOR WHAT PURPOSES.

CENTRAL TRUST & SAFE DEPOSIT CO. et al. v. RESPASS.

(Court of Appeals of Kentucky, 1902. 112 Ky. 606, 66 S. W. 421, 56 L. R. A. 479, 99 Am. St. Rep. 317.)

Action by Jerome B. Respass against the executors of Solomon L. Sharp for a settlement of partnership accounts. Judgment granting relief sought, and defendants appeal.

Du Relle, J. Jerome B. Respass and Solomon L. Sharp appear to have formed a copartnership, extending over several years, in the business of managing a racing stable, and, in connection with that business, were engaged in "bookmaking," or making wagers upon race horses. They seem, also, to have had an interest in a pool room at Newport. For the book business a separate account was kept by a cashier employed for the purpose. They had no regular time for making settlements with each other, but at various times, when requested, the cashier made out statements of the booking business of the firm. It appears from the testimony of Bernard, the cashier, that Sharp in November, 1897, handed him $4,724, and told him to deposit it to his (Sharp's) credit in the Merchants' National Bank of Cincinnati, Ohio, which was done. Sharp appears to have stated at the time that one-half of this fund belonged to Respass. It appears further that this was the "bank roll" of the bookmaking concern, in which each partner had an equal interest. At the same time he remarked that Respass had paid out $1,500 for the firm, and that he would see him in a few days and settle with him. Sharp died suddenly, before any such settlement was made. The money in the bank roll was on deposit to Sharp's credit. The racing business of the firm seems to have been almost entirely in the hands of Respass, who attended to the horses, trained them, entered them in races, and at times wagered on them for the benefit of the firm, which divided the profits or shared the losses, as the case might be. Respass brought suit against Sharp's executors for a settlement of the partnership accounts. The horses in the racing stable were sold under order of court, and various claims against the fund in court were made by Respass for expenses incurred in keeping, shoeing, clipping, training, and caring for the various

horses, as well as for entering certain of the horses in stakes, and for wagers paid upon the horses "Fair Deceiver" and "Shannon." The business of breeding, training, and racing horses for purses is legal. The partnership for that purpose can undoubtedly be settled by the chancellor. The only question presented as to this matter is upon the correctness of the settlement made.

[After allowing certain items for training and keeping the horses, and entering them for races:] Another item to which exception is taken consists of $700; being the amount of two bets made, lost, and paid by Respass on the horses "Fair Deceiver" and "Shannon." In view of the statutory law of Kentucky (see section 1955 et seq., Ky. St.), we are unable to see how any legal consideration can exist for a promise to reimburse to a partner any portion of any sum lost upon a bet on a horse race. In Lyons v. Hodgen, 90 Ky. 280, 13 S. W. 1076, it was held, in an opinion by Chief Justice Lewis, that this statute, providing that "every contract, conveyance, transfer or assurance, for the consideration, in whole or in part, of money, property or other thing won, lost or bet in any game, sport, pastime, wager, or for the consideration of money, property or other thing lent or advanced for the purpose of gaming or lent or advanced at the time of any betting, gaming or wagering to a person then actually engaged in betting, gaming or wagering, shall be void"—applied to dealing in "futures"; that the process by which the money was won or lost was a wager, within meaning of the statute, which was designed to embrace every species of wagering, whether practiced at the time the statute was enacted, or since devised. And in the opinion by the same judge in Sharp v. Com. (from Kenton county) 98 Ky. 574, 35 S. W. 553, it was held that betting upon horse races was gaming and illegal. We think it is well settled that a man who lends money to another, to be then bet on a horse race, cannot recover it back. And so it would seem that if A. agrees with B. that B. shall advance the money, and himself bet upon a horse race for their joint account, no action will lie by B. to compel A. to respond for his share of a bet which is lost. The statement of this proposition seems to decide it. It is a contract for an illegal venture. The whole contract is illegal. No right of action can arise out of that contract. This is exactly the position of Respass as to the two bets. He advanced the money to make them for himself and Sharp, relying upon Sharp's express or implied agreement to pay half the losses if loss should be incurred. Such a contract cannot be enforced in this state.

A closer question is presented by the claim for a divison of the "bank roll." This $1,724 was, as found by the chancellor, earned by the firm composed of Respass and Sharp in carrying on an illegal business—that of "bookmaking"—in the state of Illinois. But though this amount had been won upon horse races in Chicago, it is claimed that, though secured illegally, "the transaction has been closed, and the appellee is only seeking his share from the realized profits from

the illegal contracts, if they are illegal." On the other hand, it is claimed for appellants that, as to the bank roll, this proceeding is a bill for an accounting of profits from the business of gambling.

It does not seem to be seriously contended that the business of "bookmaking," whether carried on in Chicago or in this commonwealth, was legal, for by the common law of this country all wagers are illegal. Irwin v. Williar, 110 U. S. 510, 4 Sup. Ct. 160, 28 L. Ed. 225. One of the most interesting cases upon this subject is that of Everet v. Williams—the celebrated Highwaymen's Case—an account of which is given in 9 Law Quart. Rev. 197. That was a bill for an accounting of a partnership in the business of highwaymen, though the true nature of the partnership was veiled in ambiguous language. The bill set up the partnership between defendant and plaintiff, who was "skilled in dealing in several sorts of commodities"; that they "proceeded jointly in the said dealings with good success on Hounslow Heath, where they dealt with a gentleman for a gold watch"; that defendant had informed plaintiff that Finchley "was a good and convenient place to deal in," such commodities being "very plenty" there, and if they were to deal there "it would be almost all gain to them"; that they accordingly "dealt with several gentlemen for divers watches, rings, swords, canes, hats, cloaks, horses, bridles, saddles, and other things, to the value of £200 and upwards"; that a gentleman at Blackheath had several articles which defendant thought "might be had for little or no money, in case they could prevail on the said gentleman to part with the said things"; and that, "after some small discourse with the said gentleman," the said things were dealt for "at a very cheap rate." The dealings were alleged to have amounted to £2,000 and upwards. This case, while interesting, from the views it gives of the audacity of the parties and their solicitors, sheds little light upon the legal questions involved, for the bill was condemned for scandal and impertinence, the solicitors were taken into custody and "fyned" £50 each for "reflecting upon the honor and dignity of this court," the counsel whose name was signed to the bill was required to pay the costs, and both the litigants were consequently hanged at Tyburn and Maidstone, respectively, while one of the solicitors was transported. This case is found referred to in the cases of Sykes v. Beadon, 11 Ch. Div. 170, 195, and McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117. In the Sykes Case it was held, in the opinion by Sir George Jessel: "It is no part of the duty of a court of justice to aid either in carrying out an illegal contract, or in dividing the proceeds arising from an illegal contract between the parties to that illegal contract. In my opinion, no action can be maintained for the one purpose more than for the other." In Watson v. Fletcher, 7 Grat. (Va.) 1, the business of the firm had been the operation of a faro bank. One of the partners having died, the survivor sought an accounting of profits earned. The syllabus reads: "A court of equity will not lend its aid for the settlement and adjustment of the transac-

tions of a partnership for gambling. Nor will it give relief to either partner against the other, founded on transactions arising out of such partnership, whether for profits, losses, expenses, contribution, or reimbursement." To the same effect is Shaffner v. Pinchback, 133 Ill. 410, 24 N. E. 867, 23 Am. St. Rep. 624. In McMullen v. Hoffman, supra, it appeared that a partnership was formed for the purpose of obtaining a public contract by unlawful means, upon the terms of sharing the profits equally, and that the profits came into the hands of one partner. The other filed a bill for an accounting, and was denied relief. Said the court: "We must therefore come back to the proposition that to permit a recovery in this case is, in substance, to enforce an illegal contract, and one which is illegal because it is against public policy to permit it to stand. The court refuses to enforce such a contract, and it permits defendant to set up its illegality, not out of any regard for defendant who sets it up, but only on account of the public interest. * * * To refuse to grant either party to an illegal contract judicial aid for the enforcement of his alleged rights under it tends strongly towards reducing the number of such transactions to a minimum. The more plainly parties understand that when they enter into contracts of this nature they place themselves outside the protection of the law, so far as that protection consists in aiding them to enforce such contracts, the less inclined they will be to enter into them. In that way the public secures the benefit of a rigid adherence to the law." See, also, the cases of Snell v. Dwight, 120 Mass. 9; Morrison v. Bennett, 20 Mont. 560, 52 Pac. 553, 40 L. R. A. 158; King v. Winants, 71 N. C. 469, 17 Am. Rep. 11; Watson v. Murray, 23 N. J. Eq. 257; Gould v. Kendall, 15 Neb. 549, 19 N. W. 483; Craft v. McConoughy, 79 Ill. 346, 22 Am. Rep. 171; Northrup v. Phillips, 99 Ill. 449; Wiggins v. Bisso, 92 Tex. 219, 47 S. W. 637, 71 Am. St. Rep. 837; Chicago, M. & St. P. R. Co. v. Railroad Co., 9 C. C. A. 659, 61 Fed. 993; Emery v. Candle Co., 47 Ohio St. 320, 24 N. E. 660, 21 Am. St. Rep. 819; Hunter v. Pfeiffer, 108 Ind. 197, 9 N. E. 124.

Upon the other hand, a large number of cases are relied on on behalf of appellee. Many of these cases do not seem to us to bear directly upon the question here involved. We shall first consider the Kentucky cases: In Bibb v. Miller, 11 Bush, 306, the contest was between two persons, each of whom claimed title to the proceeds of a winning lottery ticket. The court was careful to say: "The question as to the legality of the sale of tickets and the distribution of prizes arises collaterally, and derives its importance solely from the fact that the plaintiffs in the action are compelled to rely on such sale and distribution in order to make out their title to the fund in controversy." In that case the corporation had recognized its obligation to pay, and voluntarily paid into court the amount claimed to be due on the coupon. The question there was whether the library company was acting pursuant to legal authority in selling the ticket and paying the prize distribut-

ed to that ticket; and the court held that, "in the absence of proof to the contrary, we must assume that it acted within the scope of the powers granted it by its act of incorporation." In Martin v. Richardson, 94 Ky. 183, 21 S. W. 1039, 19 L. R. A. 692, 42 Am. St. Rep. 353, a lottery ticket owned by one man had been fraudulently obtained from him by another and the proceeds collected. It was held that, the purchase of the ticket not being shown to have been made in a state where such purchase was illegal, the presumption was in favor of its legality. In Irwin v. Irwin, 107 Ky. 24, 52 S. W. 927, a lottery ticket, or its proceeds, was given by a husband to his wife, and invested in real estate. It was held that, "whether the purchase was illegal or not, such transfer comes distinctly within the meaning and purview of the peremptory statute which requires the restoration of property obtained directly or indirectly from or through the other party by reason of the marriage." So, in Maize v. Bradley (Ky.) 64 S. W. 655, where, in an action to recover money had and received, it was claimed the fund had been placed in the hands of defendants to avoid taxation, it was held this defense was not available, as the fund had been reinvested, and a new contract entered into between the parties, untainted by the illegality of the original transaction. In the case at bar there was no division of the unlawful gains made by Sharp at Chicago. There was no new transaction with reference to them, such as the investment of the fund, or any part of it, in horses, for their joint account. There was not even an accounting of the gains, accompanied by a promise to pay to Respass the amount ascertained to be due him under the terms of the illegal partnership agreement. There was simply a termination by death of an illegal partnership, with unlawful gains in the hands of one of the partners, an accounting for which is here sued for. We are cited to but two cases which seem to come up to the requirements of appellee's contention. Both of those cases have been subsequently questioned. There are many cases which come within the general terms of the doctrine laid down in Norton v. Blinn, 39 Ohio St. 145: "Public policy does not require that one engaged in an unlawful enterprise should, by pleading it, shield himself from liability for the wages of his employés, agents, or servants. * * * It is contrary to public policy and good morals to permit employés, agents, or servants to seize or retain the property of their principal, although it may be employed in illegal business and under their control. No consideration of public policy can justify such a lowering of the standard of moral honesty required of persons in these relations. And again, if parties to an illegal contract waive the illegality and honestly account as between themselves, no other person can be heard to complain of such accounting. Hence we think that, if in making such settlement, one of the guilty parties should deliver property or money to an agent of another, to be delivered by the agent to his principal, such agent is bound to account therefor to his principal." It seems clear, also, that a wrongdoer who, by force or fraud,

obtains money or property from another, or violates a trust imposed in him, cannot be heard to charge his victim with wrongdoing in the original obtention of the money or property. To this class belong the cases of Farmer v. Russell, 1 Bos. & P. 295; Tenant v. Elliott, Id. 2; Catts v. Phalen, 2 How. (U. S.) 376, 11 L. Ed. 306. And see Pol. Cont. 334, note. The doctrine as to such cases is aptly stated in Catts v. Phalen, supra: "Phalen & Morris had in their possession twelve thousand five hundred dollars, either in their own right, or as trustees for others interested in the lottery. No matter which, the legal right to this sum was in them. The defendant claimed and received it by false and fraudulent pretenses, as morally criminal as by larceny, forgery, or perjury; and the only question before us is whether he can retain it by any principle or rule of law." The cases which come nearest to supporting the contention of appellee are Sharp v. Taylor, 2 Phil. Ch. 801, and Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. Ed. 732. The former case was a partnership in a vessel registered in violation of the laws of both Great Britain and the United States. Her voyages were profitable, but one partner, colluding with an outsider, obtained possession of the profits and refused to account. The illegality of the traffic was relied on by him as a defense to an accounting. Said Lord Cottenham: "He is not seeking compensation and payment for an illegal voyage. That matter was disposed of when Taylor [the defendant] received the money, and plaintiff is now only seeking payment for his share of the realized profits. * * * As between these two, can this supposed evasion of the law be set up as a defense by one as against the otherwise clear title of the other? Can one of two partners possess himself of the property of the firm, and be permitted to retain it, if he can show that in realizing it some provision in some act of parliament has been violated or neglected? * * * The answer to this, as to the former case, will be that the transaction alleged to be illegal is completed and closed, and will not be in any manner affected by what the court is asked to do between the parties." This doctrine comes very close to appellee's contention, but, on examination, can be distinguished from the case at bar, and had been criticised and denied by Sir George Jessel, master of the rolls, in Sykes v. Beadon, supra, as well as in the case of McMullen v. Hoffman, 174 U. S. 639, 19 Sup. Ct. 839, 43 L. Ed. 1117. The case of Brooks v. Martin, 2 Wall. (U. S.) 70, 17 L. Ed. 732—much relied upon by appellee—is explained and qualified by the Supreme Court in McMullen v. Hoffman, supra (page 668, 174 U. S., page 850, 19 Sup. Ct., and page 1128, 43 L. Ed.), in the opinion by Mr. Justice Peckham: "The action was sustained upon the theory that the purpose of the partnership agreement had been fully closed and completed, that substantially all the profits arising therefrom had been invested in other securities or in lands, and that therefore it did not lie in the mouth of the partner who had by fraudulent means obtained possession and control of these funds to say to

the other that the original contract was illegal." The case is also criticised in King v. Winants, 71 N. C. 473, 17 Am. Rep. 11, as follows: "Two men enter into a conspiracy to rob on the highway, and they do rob, and while one is holding the traveler the other rifles his pocket of $1,000, and then refuses to divide, and the other files a bill to settle up the partnership, when they go into all the wicked details of the conspiracy and the rencounter and the treachery. Will a court of justice hear them? No case can be found where a court has allowed itself to be so abased. Now, if the robbers had taken the $1,000 and invested it in some legitimate business as partners, and had afterwards sought the aid of the court to settle up that legitimate business, the court would not have gone back to inquire how they first got the money. That would have been a past transaction, not necessary to be mentioned in the settlement of the new business. And this illustrates the case of Brooks v. Martin, supra, so much relied on by plaintiff." See, also, Snell v. Dwight, 120 Mass. 9, 19; Morrison v. Bennett, 20 Mont. 560, 572, 52 Pac. 553, 40 L. R. A. 158; Gould v. Kendall, 15 Neb. 549, 556, 557, 19 N. W. 483; Wiggins v. Bisso, 92 Tex. 219, 225, 47 S. W. 637, 71 Am. St. Rep. 837.

We conclude that in this country, in the case of a partnership in a business confessedly illegal, whatever may be the doctrine where there has been a new contract in relation to, or a new investment of, the profits of such illegal business, and whatever may be the doctrine as to the rights or liabilities of a third person who assumes obligations with respect to such profits, or by law becomes responsible therefor, the decided weight of authority is that a court of equity will not entertain a bill for an accounting.

The judgment of the chancellor is therefore reversed, and the cause remanded, with directions to enter a judgment in accordance with this opinion.

CHAPTER III.

THE NATURE AND CHARACTERISTICS OF A PARTNERSHIP.

SECTION 1.—VARIOUS CONCEPTIONS OF THE NATURE OF A PARTNERSHIP.

Ex parte CORBETT.

In re SHAND.

(Chancery Division of High Court of Justice, 1880. L. R. 14 Ch. Div. 122.)

* * * On the 24th of September, 1864, C. J. Corbett granted to Francis Shand, Charles Shand, Alexander Shand, and R. A. Robinson, who were then carrying on business in partnership as merchants, a lease of six rooms in the house No. 23 Rood Lane, in the city of London, for a term of 13¾ years, less 12 days, from the 24th day of June, 1864, at an annual rent of £415. The lease contained a covenant by the lessees, jointly, and severally, to pay the rent and repair the premises. The rooms were occupied for the purpose of the partnership business, and the lease was as between the partners partnership property. Francis Shand died, and the business was thenceforth carried on in partnership by the other three lessees in the same rooms, until on the 12th of August, 1875, they were adjudicated bankrupts. On the 30th of August, 1875, a trustee of their property was appointed, and he, on the 6th of October, 1875, obtained leave from the court to disclaim the lease. He afterwards executed a disclaimer, and possession of the rooms was given up to and accepted by the lessor. The lessor afterwards relet the rooms, but at a lower rent. On the 14th of May, 1879, he tendered a proof against the joint estate of the bankrupts, and also against their separate estates, for £396 2s. 6d. This sum was made up of £346 2s. 6d., the difference between the amount of the rent which would, if there had been no disclaimer, have been payable under the lease from the 29th of September, 1875, to the expiration of the term, and the amount of the rent which had been actually received under the reletting during the same period, and £50 for dilapidations to the rooms. The Registrar ordered the proof to be admitted against the joint estate only. The lessor appealed.

JAMES, L. J. * * * We start with this fact that the trustee wants to get rid of the lease, that it is a damnosa hæreditas, and therefore it never could have been for any practical purpose any part of either joint or separate estate. * * * Whose lease was it that he was disclaiming? It was not the lease of the firm, because there was no such thing as a firm known to the law. The firm, as cestuis que trustent, might have been the beneficial owners of the lease; but the legal estate in the lease was vested in three joint tenants, A., B., and C., who happened to be in business together, and unfortunately happened to become bankrupt. The trustee, who is the trustee of the joint estate, as well as of the separate estates, is the trustee of the property of A., B., and C., and he is authorized, although he may have done some act which under the old law would have bound him to elect to take the lease, to disclaim it. He is authorized to release the bankrupts from all the liability under which they would have been if the lease had not been surrendered. Then he, under that statutory power, surrenders the lease against the will of the lessor, and the lessor is obliged to accept the surrender. For whom is he surrendering it? He is surrendering it for the three joint tenants whose lease it was. He is surrendering it for them, and for each of them. Each of them was possessed of the lease per my et per tout. That being so, the Legislature has said: "You may on behalf of those persons surrender the lease entirely, and put an end to it as between the lessor and the lessee." The lessor has certain remedies against his lessees. But the Legislature says to him: "Instead of those remedies, you may prove against the estate of the bankrupt." Of course, the word "bankrupt" may mean plural or singular, or plural and singular, according to the context. But section 23 says: "You may have a right of proof against an estate for the damage you have sustained. It is not very much we give you; but we do give you a right of proof for the amount of the damage you have sustained." Against whom is he to prove? He is to prove against the bankrupt whose trustee has disclaimed. * * * There were four persons who covenanted jointly, and there is no joint estate of those four. How the case would have stood if the three bankrupts had entered into the joint covenant it is not necessary for me to say. But here there is a distinct liability of each of the three bankrupts on their covenant, and that liability has been put an end to by the act of the trustee. The act of the trustee has inured to the injury of the lessor. The lessor has a right of proof. Against whom? It seems to me it must be against the estates of the persons upon whose behalf and for whose benefit the lessor has been made to endure this injury; that is to say, he is entitled to prove against the separate estate of each of those three persons. That, as it appears to me, would have been the proper order for the Registrar to make, and no proof ought to have been admitted against the joint estate.

Succession of PILCHER.

(Supreme Court of Louisiana, 1887. 39 La. Ann. 362, 1 South. 929.)

Appeal from a judgment allowing the account of the administrator of the estate of one Pilcher. The appellant is a creditor of the firm of Embery & Pilcher, and objects to the allowance of $1,000 to the minor child of the deceased, Pilcher, out of the fund realized from the sale of the assets of Embery & Pilcher. Pilcher was insolvent, and had no property except his interest in the partnership.

WATKINS, J. In support of his theory that partnership funds cannot be applied to the claim of the necessitous minor and the commissions of the administrator, because they are by law consecrated to the payment of the debts of the partnership, which is insolvent, he cites Succession of Stauffer, 21 La. Ann. 520. In that case the claim for $1,000 set up in favor of the necessitous widow and minor, was denied under very like circumstances to those presented here. Its allowance was opposed by the creditors of the partnership of Stauffer & Co., of which the deceased had been a member; and the opposition was sustained on the ground that the property of the partnership does not belong to either of the partners separately, but remains common stock, and a pledge for the payment of the debts of the firm in preference to any claims against the individual partners. In Smith v. McMicken, 3 La. Ann. 322, the court said: "The partnership, once formed and put into action, becomes, in contemplation of law, a moral being, distinct from the persons who compose it. It is a civil person, which has its peculiar rights and attributes. * * * Hence, therefore, the partners are not the owners of the partnership property. The ideal being, thus recognized by a fiction of law, is the owner. It has the right to control and administer the property to enable it to fulfill its legal duties and obligations; and the respective parties, who associated themselves for the purpose of participating in the profits which may accrue, are not owners of the property itself, but of the residuum which may be left from the entire partnership property, after the obligations of the partnership are discharged." City of New Orleans v. Gauthreaux, 32 La. Ann. 1128.

Judgment amended, disallowing the $1,000.

HUBBARDSTON LUMBER COMPANY v. COVERT.

(Supreme Court of Michigan, 1877. 35 Mich. 255.)

Wilson Homer, of North Plains, Mich., and Henry P. Marcy, who resided in Massachusetts, were partners in the lumber business under the name of Homer & Marcy. The partnership executed a mortgage to Mrs. Homer on a quantity of logs. A portion of the logs were in North Plains, where Homer, the resident partner of the firm, lived,

and the remainder were at Crystal, Mich. The Hubbardston Lumber Company bought the logs from Mrs. Homer, the mortgagee, with the consent of the resident partner, Homer, and manufactured them into lumber. Covert, the defendant, as deputy sheriff, seized the lumber to satisfy an execution issued on a judgment in favor of one Thompson against Homer & Marcy on a partnership indebtedness. The Hubbardston Lumber Company brought replevin to recover the lumber, relying upon the title derived from Mrs. Homer. It was contended that the mortgage was invalid, as not complying with the statute, which required a chattel mortgage to be filed where the owner of the property resided, or, if he was a nonresident, then where the property was located; that as Marcy was not a resident of Michigan, and the mortgage was filed only in North Plains, where Homer, the resident partner of the firm, lived, and not in Crystal, where the property of the partnership was, it was absolutely void against attaching creditors. The trial court directed a verdict for the defendant. The plaintiff alleged error.

Graves, J. For many purposes a firm, though managed from necessity by its members, is a distinct concern and possess a sort of individuality. The assets are held in a sort of community, but the partners do not hold as common tenants or joint tenants. The property is distinctly separated from that belonging to the individual members, and it constitutes an identical and entire interest. The law makes distinctions between debtors and creditors of the firm on the one hand, and debtors and creditors of the persons composing the firm on the other, and assets are gathered, catalogued, and appropriated according to these distinctions. A member may become debtor or creditor of the firm, and each member is agent for it, and within limits stands for it. For some purposes, then, the law contemplates the firm as having a sort of ideal existence, and with the faculty of being in the relation of principal to agent in a certain representative sense. The agency consequent upon the relation extends no further than to firm transactions. As partner there is no power to bind individual interests. Either partner may contract for the firm in the firm name, and the act is the act of the firm, and not that of the individual who actually transacts. It is just the same as though the firm were a natural person and acted personally. Taxes may be imposed on a firm in the firm name. Section 978, Comp. Laws 1871. And suits are allowed to be brought in justices' courts for and against copartnerships in the firm name, where the members' names are unknown. Section 5307, Comp. Laws 1871. These and other characteristics of individuality are sufficient to show that the firm has in many aspects a recognized legal identity.

That it may have a local abiding place is as certain as that a corporation can. Carron Iron Co. v. Maclaren, 5 H. of Lords Cases, 416. And, where it has, I see no reason why it may not, as well as a corporation, be said to reside there, within the meaning of the statute

which provides for filing chattel mortgages. Undoubtedly there may be cases in which it would be difficult to decide upon the question of abode; but this is nothing more than happens often where the question concerns the residence of natural persons. Indeed, there is reason for thinking that much fewer perplexing cases would occur in inquiries respecting the seats or abodes of firms than in inquiries concerning the residence of the individuals. In this case the mortgage purported to be the contract or mortgage of the firm, and not of the individuals composing it, as individuals, and the evidence tended to show that the firm resided or had its seat in North Plains. The only member residing in the state, the only party representing or authorized to represent the firm, lived there, and in the state of things which appeared, and in the absence of countervailing proof, this was strong evidence of the residence of the firm there. This mortgage on firm property, made in the firm name by this very party, was there filed, and it seems to me this should be considered a sufficient filing within the spirit of the statute.

The judgment should be reversed, with costs, and a new trial ordered.

JONES v. BLUN et al.

(Court of Appeals of New York, 1895. 145 N. Y. 333, 39 N. E. 954.)

BARTLETT, J. This action is brought to set aside certain transfers made by the Rheubottom & Teall Manufacturing Company to the firm of F. S. M. Blun & Co., on the ground that defendant Blun was a stockholder of said corporation and that the transactions attacked were after the corporation had refused the payment of its notes or other evidences of debt, and were, therefore, prohibited by statute. 1 Rev. St. (1st Ed.) p. 603, pt. 1, c. 18, tit. 4, § 4; 3 Rev. St. (Banks & Bros.' 8th Ed.) p. 1729.

The plaintiff recovered at Special Term, and the General Term affirmed the judgment.

[The statute prohibited a corporation, which has refused payment of its debts, from transferring any of the property to an officer or stockholder directly or indirectly for the payment of any debt. The transfers attacked in this case were made by the corporation to a partnership of which Blun, a stockholder in the corporation, was a member. It was contended that such transfers were not to a stockholder of the corporation, and hence not invalid under the statute.]

There is no such potency in the entity known as a copartnership as to shield a stockholder of a corporation from the penalty denounced by this statute because he happens to be a member of a firm, and thus allow him to secure to himself a preference of his claim against a corporation. If his copartner, who is not a stockholder, is injured by the enforcement of the statute, it may be a matter for adjustment between

themselves, but offers no reason for suspending the operation of the statute. If the contrary doctrine were to prevail, it would result in the officers and stockholders of corporations securing to themselves indefinite preferences by forming partnership relations in which the interest in the firm profits of the partner not a stockholder would be only nominal.

Judgment affirmed.[1]

BROWN et al. v. HARTFORD FIRE INS. CO.

(Supreme Judicial Court of Massachusetts, 1875. 117 Mass. 479.)

Colt, J. The action is upon a policy of fire insurance in favor of the plaintiffs, Brown & Cottrell, who were partners in business. After the fire the policy was surrendered and canceled, on payment by the defendant of a sum of money to Brown in full satisfaction and compromise of all claims under it. A receipt and discharge was given by him in the name of the firm, which is relied upon by the defendants as a bar to this claim. The plaintiffs reply that the settlement and discharge were procured by false and fraudulent representations, and that Brown was a minor when he gave it. The case finds that the money received by Brown was divided with his partner, as were also the damaged goods which were not sold after the fire. It is not necessary to consider all the questions raised on this report, because the settlement and discharge relied on, although obtained by false and fraudulent representations, constitutes a good defense until rescinded and avoided by a return or an offer to return the money paid by the defendant to obtain it. As a general rule a party cannot rescind a contract and retain the consideration, in whole or in part, which he has received under it. There is an exception to this rule in favor of infants and those who are under some form of disability. So that, where the consideration of the contract has been wasted or lost during minority, the infant does not lose his right to avoid it without restoration. Chandler v. Simmons, 97 Mass. 508, 514, 93 Am. Dec. 117; Bartlett v. Drake, 100 Mass. 174, 97 Am. Dec. 92, 1 Am. Rep. 101; Bassett v. Brown, 105 Mass. 551, 558; Gibson v. Soper, 6 Gray, 279, 66 Am. Dec. 414.

The plaintiffs cannot avail themselves of this exception to exempt them from the duty of returning the consideration received. It is the firm that seeks to recover this insurance. The consideration for the release was received by the partnership in discharge of the policy. It was a ratification of the act of the infant partner, if such ratification

[1] "In the contemplation of law there is no merger or fusion of the several persons composing a partnership into a common or comprehensive person including them all. A firm adds nothing to population, and in this respect is unlike a corporation, which augments population in the legal, though not in the natural, world." Per Bleckley, C. J., in Drucker v. Wellhouse, 82 Ga. 129, 132, 8 S. E. 40, 2 L. R. A. 328 (1888).

was necessary. The infancy of one partner cannot excuse the firm from its duties to the defendant, so that the firm may sue on the contract without first returning the consideration received.

The evidence offered to show the infant partner's want of ability to restore this money, and his liability on account of the partnership for a much larger sum, was rightly rejected, and according to the terms of the report there must be

Judgment for the defendant.

BANK OF BUFFALO v. THOMPSON et al.

(Court of Appeals of New York, 1890. 121 N. Y. 280, 24 N. E. 473.)

EARL, J. On the 24th day of April, 1882, John Thompson was indebted to the plaintiff upon his individual promissory notes, and was then carrying on business in his own name, and in that way had dealings with the plaintiff. On that day he executed to it a mortgage conditioned for the payment of all notes, checks, or bills of exchange thereafter "made, drawn, indorsed, or accepted" by Thompson and discounted by plaintiff for his benefit, and also for the payment of "all sums of money which shall at any time be due or owing by him to said bank upon any account whatever." Subsequently to the execution and delivery of that mortgage Thompson continued his individual dealings with the plaintiff, and it discounted for his benefit notes made or indorsed by him. Several years after the mortgage was given, Thompson formed a copartnership with three other persons, under the firm name of Reynolds, Thompson & Co., and the firm carried on the business under that name, and the plaintiff discounted for the firm several notes made and indorsed by Thompson in the firm name. The plaintiff claims that these firm notes are secured by the mortgage, and the defendants contend that they are not so secured, and their contention has been sustained by the court below, and mainly, it is said, upon the authority of First National Bank of Batavia v. Tarbox, 38 Hun, 57.

We think the court below properly construed the condition of the mortgage. It is clear that at the time of the execution of the mortgage the parties did not contemplate any firm indebtedness, or any indebtedness of a firm of which Reynolds might be member. The plaintiff was dealing with him individually, and it was obtaining security for his individual and personal obligations, and a fair construction of the language shows that it was intended to secure such obligations and such only. The language is broad and general, and carefully framed so as to make sure that all such obligations should be covered. In ordinary commercial language the obligation of a firm would not be spoken of as the obligation of any one of its members, and a firm is regarded as an entity distinguished from all the individual members of which it is composed. In Parsons on Partner-

ship, 346, it is said: "A partnership is a legal body by itself. We do not say it is a corporation, because it wants some of the most essential elements of incorporation, but we say it is a body by itself, and is so recognized by the law for some purposes, and should be—always in a proper way, and to a proper degree—for all purposes; and among these purposes is the placing of its relation to its creditors on the basis of contracting its own debts, and having its own creditors, and possessing its own property, which it applies to the payment of its debts." It was held in Fitzgerald v. Grimmell, 64 Iowa, 261, 20 N. W. 179, that a partnership under the statutes of that state was a legal entity, known to and recognized by law. It is probably the most accurate to say that a partnership is not strictly a legal entity, distinguished from the individuals composing it. Lindley on Partnership (Am. Ed.) 5; Faulkner v. Hyman, 142 Mass. 53, 6 N. E. 846. In Lindley on Partnership, p. 110, it is said: "Partners are collectively a firm. Merchants and lawyers have different notions respecting the nature of a firm. Commercial men and accountants are apt to look upon a firm in the light in which lawyers look upon a corporation; i. e., as a body distinct from the members composing it, and having rights and obligations distinct from those of its members. Hence, in keeping partnership accounts the firm is made debtor to each partner for what he brings into the common stock, and each partner is made debtor to the firm for all that he takes out of that stock. In the mercantile view, partners are never indebted to each other in respect of partnership transactions, but are always either debtors to or creditors of the firm." But this, the learned author says, is not the legal notion of a firm, and that the firm is not recognized by lawyers as distinct from the members composing it.

This mortgage must be regarded as a commercial instrument, executed in commercial transactions, and must be construed as ordinary commercial men would understand the language used; and we think that among business men a distinction is made between the firm as an entity and the members who compose it, and that this language would not be understood as broad enough to cover the indebtedness of a firm of which Thompson was member, and for whose debts, jointly with the other members of the firm, he could be made responsible. We are therefore of opinion that the judgment below was right, and should be affirmed.

Judgment affirmed.

SECTION 2.—THE PARTNERSHIP NAME.

McGREGOR et al. v. CLEVELAND.

(Supreme Court of New York, 1830. 5 Wend. 475.)

The action was on a promissory note for $280, dated 23d October, 1827, payable to "McGregor, Darling & Co.," and signed by "Oliver Cleveland, Frederick Cleveland, and Rufus Cleveland." The signature of Oliver Cleveland was proved, and that the names Frederick Cleveland and Rufus Cleveland were in the proper handwriting of Rufus Cleveland. In two other instances, Rufus Cleveland had given notes, signing the same "F. & R. Cleveland," which were ratified by Frederick Cleveland. Frederick Cleveland and Rufus Cleveland were in partnership as farmers and coopers. * * * The counsel for the defendants insisted that the evidence as to the execution of the note by Frederick Cleveland, and as to the plaintiffs being the payees, was not sufficient to entitle the plaintiffs to recover. The judge ruled otherwise, and under his direction the jury found for the plaintiffs. The defendants' counsel excepted, and now moved for a new trial. * * *

SAVAGE, C. J. The questions raised by the bill of exceptions are: (1) Whether there was sufficient proof of the execution of the note by Frederick Cleveland. * * *

So far as respects F. & R. Cleveland, the note will be presumed, in the absence of all proof to the contrary, to have been given for a partnership transaction. There is no proof as to what was the style of their firm, except that in two instances the name of F. & R. Cleveland was used. In this instance, one partner wrote the names of both at length, thus: "Frederick Cleveland and Rufus Cleveland," coupling the two names together. Being partners, each had power to charge the other; and, in my opinion, the signature was sufficient, and the evidence enough to justify a verdict on this point against all the defendants. * * *

[A new trial was granted because of the insufficiency of the proof that the plaintiffs were the payees of the note.]

HASKINS v. D'ESTE et al.

(Supreme Judicial Court of Massachusetts, 1882. 133 Mass. 356.)

W. ALLEN, J. St. 1877, p. 549, c. 163, provides that "any signature to a written instrument declared on or set forth as a cause of action or ground of defense or set-off, in an action at law, shall be taken as admitted, unless the party sought to be charged thereby

shall file in court, within the time allowed for answer, a special denial of the genuineness of such signature and a demand that the party relying thereon shall prove the same at the trial."

The two defendants were sued in a writ which describes them as "late copartners under the firm name and style of D'Este & Co.," and the declaration alleges that they made a promissory note signed D'Este & Co." One of the defendants, McKenzie, did not appear. The other, D'Este, appeared and filed a general denial. The question is whether the signature is to be taken as admitted to bind D'Este, or whether it is only admitted as the signature of a copartnership of D'Este & Co., and the plaintiff, to hold D'Este, must prove that he was a member of the firm whose signature he admits. The question is precisely what it would have been if both defendants had appeared and filed a general denial in answer. The admission is the same, as to those making it, whether made by both defendants together, or separately, or by one alone.

A partnership is not a person distinct from its members, like a corporation. A partnership cannot be sued. A suit must be against the individuals composing it, and each individual stands, as to proof of his liability, as if he were sued alone. In either case his personal liability upon the joint undertaking would have to be made out, and in either case the allegation of partnership would but express the relation between the copartners; and the relation of copartners to each other, as affects their liability to third persons, is simply one of agency. The allegation that a number of individuals as members of a copartnership made a contract is only the allegation that each of them, personally or by his agent, made it, and the agency is alleged and proved by the copartnership.

In the case at bar the substantial allegation is that each of the defendants made a joint note in the name of D'Este & Co.; that is, that each of them signed that name to the note, The allegation of copartnership amounts only to a statement that each of the defendants was authorized to sign that name for both, and that an agent might be authorized to sign for both. This is the whole significance of the firm name. It is a name which the partners adopted, by which each could, in certain matters, bind the other with himself, or another agent might bind both. It was simply a convenient abbreviation of their two names, and, when used, had the same effect as if no firm name had been adopted and the name of each partner had been signed in full as a partner; and it bound each only because he had adopted it as his name and authorized its use for the purposes for which it was used. When the defendant D'Este admits the genuineness of the signature, he does not admit it to be a mere name. He admits it to be a sign manual, the name of a person signed, and the only question is: Whose name does he admit it to be? The answer is plain. He admits it to be the genuine signature of the persons whose signature it is alleged in the declaration to be. The declaration does not allege that the firm

made the note. It alleges that the defendants, D'Este and McKenzie, in the name of D'Este & Co., made—that is, signed—the note; that it is the genuine signature of both in the name they had adopted for binding themselves jointly. It is said that it is not alleged that the note was signed by the defendant D'Este personally and that he may not have been one of the persons doing business under the name of D'Este & Co. But it is alleged that the two defendants, one of whom is D'Este, made the note in that name. If the allegation had been that the defendant D'Este, doing business in the name of John Doe, had made the note in that name, it would hardly be contended that the genuineness of his signature would not be admitted, because there might have been another person doing business in that name whose signature it might be, nor because the signature might have been made by an agent, and not by the defendant personally. The declaration alleges that the defendants made the note. If the writ is taken in connection with the declaration, there is, so far as the question in issue is concerned, only the further allegation, in effect, that the two defendants held such a relation to each other that each had authorized the other to bind him in a joint note by the name of D'Este & Co. We think the signature is alleged to be that of the defendant D'Este, and that its genuineness, not having been denied, must be taken to have been admitted. See Wilkes v. Hopkins, 1 C. B. 737; Mahaiwe Bank v. Douglass, 31 Conn. 170.

In the opinion of a majority of the court, the ruling of the judge that the plaintiff was not entitled to recover was, for these reasons, erroneous.

Exceptions sustained.

BERKSHIRE WOOLEN CO. v. JUILLARD et al.

(Court of Appeals of New York, 1879. 75 N. Y. 535, 31 Am. Rep. 488.)

Appeal from order of the General Term of the Supreme Court in the First Judicial Department, reversing an order of Special Term, which overruled exceptions to and confirmed a referee's report herein. Reported below, 13 Hun, 506.

This action was brought by plaintiff, as creditor of the firm of Hoyt, Spragues & Co., in its own behalf and in behalf of other creditors, against the receiver of said firm, appointed in a former action, and against the members of said firm, to reach the assets of said firm and have them applied in payment of its debts. By the judgment therein said firm was declared insolvent, and it was adjudged that the assets in the hands of the receiver constituted a fund out of which the creditors, upon proof of their claims, were entitled to be paid pro rata according to their respective rights, and a referee was appointed to take proof of the claims of creditors. Five savings banks presented to the referee claims upon a bond executed by one Josiah Chapin, as

principal, and by all of the members of said firm of Hoyt, Spragues & Co., individually, as sureties.

RAPALLO, J. The bond upon which the banks found their claim against the copartnership assets of the firm of Hoyt, Spragues & Co., is executed by all the six members of that firm, and purports to be their joint obligation, as well as the several obligation of each of them. It also purports to create a joint obligation on the part of any two or more of them. The only aspect in which it is necessary to consider it on this appeal is as the joint obligation of all the members of the firm, and the question presented is whether it can be enforced as a copartnership obligation against the copartnership assets, notwithstanding that the firm name is not mentioned therein, but it appears on its face to be simply the joint obligation of the copartners, contracted in their individual names, and is under seal. We are of opinion that, notwithstanding the form of the instrument, if it was executed in the business of the firm and for its benefit, it should be regarded as a copartnership obligation, payable out of the copartnership funds. When funds or property are obtained on the obligation of only a portion of the members of a firm, the fact that the property thus obtained goes to the use of the firm is not of itself sufficient to render the firm liable. But where the property is not only obtained for and applied to the benefit of the firm, but is so obtained by the joint act and upon the joint written obligation of all its members, and the credit is given to all, the transaction is in substance a copartnership transaction, though the firm name is not actually used in the writing and though the partners may have superadded to their joint obligation the several liability of each of them.

The orders should be affirmed, with costs out of the fund.

YORKSHIRE BANKING CO. v. BEATSON et al.

(Court of Appeals, 1880. L. R. 5 C. P. Div. 109.)

In these actions the respective plaintiffs appealed against the judgment of Denman and Lopes, JJ., in favor of the defendants.

THESIGER, L. J. This is an action brought upon two bills of exchange of which the plaintiffs are the holders. The first is a bill for £276. 15s., dated the 6th of March, 1878, drawn by R. R. Kelley & Co. upon, and accepted by, Messrs. J. & R. Wilson, payable to the order of the drawers four months after date, and bearing the successive indorsements, "R. R. Kelley & Co.," "Wm. Beatson," and "Josiah Carr & Son." The second is a bill for £484. 13s., dated the 13th of March, 1878, drawn by Josiah Carr & Son, addressed, "Mr. William Beatson, Chemical Works, Rotherham," and accepted in the name "William Beatson," payable to the order of the drawers four months after date, and indorsed by them. Both bills were discounted by the

plaintiffs upon the 14th of March, 1878. The defendants to the action are Wm. Beatson and John Henry Mycock. The signature "Wm. Beatson" upon each of the bills was the signature of the defendant Wm. Beatson. He has allowed judgment to go by default, and the action is defended by Mycock alone, who disputes his liability upon either of the bills.

The circumstances of the case are as follows: Beatson, for many years prior to December, 1877, carried on business as a chemical manufacturer at certain works at Rotherham. At the end of the year 1873 and beginning of the year 1874 the plaintiffs made inquiries as to Beatson's commercial position of Josiah Carr, who was bringing them paper for discount with Beatson's name upon it, and, the result of the inquiries being satisfactory, they discounted such paper. Beatson and Carr had some trade transactions together, but apart from these trade transactions there was a series of accommodation transactions carried out by accommodation bills between Beatson and the other parties to the bills now sued upon, including Carr himself, and these accommodation bills were from time to time renewed.

Down to the end of the year 1877 Beatson had no partner; but upon the 11th of December in that year a deed of partnership was entered into between him and the defendant Mycock. By its terms the partnership was to last for a period of five years, with power of continuance. The value of the good will of the business, the works and premises where the same was carried on, and the machinery, plant, and effects belonging to it, was estimated at £25,000, and Mycock was to purchase a one-fifth share of the business by the payment of the sum of £5,000. The business was to be carried on under the style of "William Beatson," the works and premises were to remain vested in Beatson, who was to stand possessed of them for the purposes of the partnership, and the business was to be managed by Beatson; his partner not being required to attend to the business any further than he should think fit. By the eleventh clause of the deed it was provided that neither of the partners, without the written consent of the other first obtained, should on the credit of the firm make any payment, advance, or other application of the money or effects of the said partnership, or in any manner engage or use the same, or the name or credit of the partnership firm, except on account and for the benefit of the partnership and in the usual manner of carrying on the business; and by the twelfth clause it was provided that neither of the partners should lend or deliver upon credit any of the moneys or effects belonging to the partnership to any person whom the other partner should previously have forbidden to be trusted, nor without the previous consent in writing of the other partner would become bail, surety, or security with or for any person whomsoever, or make, give, draw, accept, or indorse any bond, bill, promissory note, or other instrument, or enter into any obligation or engagement, or make any default, whereby the estate and effects of the partnership might be

made liable for the payment or satisfaction of any sum of money, for which the partnership should not have received a full and sufficient consideration.

The object with which Mycock entered into this partnership was that of ultimately putting his son, who was then under age, into it, and as a matter of fact Mycock never interfered in any way with the management of the business, or occupied any other position or connection with it than that of a dormant partner. Beatson concealed from him all information relating to his accommodation transactions, and for his frauds upon him in this and other matters connected with the inception of the partnership was ultimately prosecuted and convicted. The plaintiffs never knew of the partnership until July, 1878, at which date Beatson was a bankrupt. For some time prior to the formation of the partnership Beatson had kept an account at the Sheffield and Rotherham Bank, headed "William Beatson," and after the formation of the partnership that account was continued without any change in its heading, and into that account Beatson paid all moneys, whether moneys belonging to the partnership or his own private moneys, and upon it he drew, whether for the purpose of the business or his own private purposes. Beatson himself was called as a witness for the plaintiffs, and in addition to proving the facts already mentioned gave evidence to the effect that he kept two cash books, of which one was, as he stated, a private book kept as manager at the place of business, and the other a partnership cash book; that in the former he did not enter cash received on account of the partnership, but that in the latter all business payments were entered. With reference to his bill accommodation transactions generally he stated that none of them were brought into the ledger either before the partnership or after; that the cash transactions relating to these accommodation bills were entered in the private book, to which Mycock had no access, and were never put into the partnership cash book, to which Mycock might have had access. With reference to his particular transactions with Josiah Carr he stated that all trade transactions between them were over before the partnership, and that as regards the particular bills sued on they were bills drawn for his and Carr's accommodation, not for Mycock's, although he added that they were in a degree for the business as one way of finding capital, and that without the bill transactions there was not capital enough to work the business. He admitted that Mycock found the £5,000 which he was to pay for his share in the business, that he never told Mycock that money was wanted; that he thought that he was not making Mycock liable for any of the accommodation bills, whether renewals or otherwise, and that he considered them private transactions, and did not enter them in the partnership books. He further said that he considered the bank book private, and that Mycock had left him to keep the banking account as he thought proper; that the proceeds of the accommodation bills were paid into the banking account; and that out

of such proceeds goods supplied to the business and wages were sometimes paid. As regards the proceeds of the bills sued on, it appeared that a portion of them found their way into the banking account, but that upon the same day when this occurred Beatson drew out more than he put in. On the part of Mycock an accountant was called, who upon examination of Beatson's books proved that, apart from the accommodation bill transactions, the business had during the period between the beginning of January and the end of May, 1878, a cash balance to its credit, that the net result of the accommodation bills was to reduce the balance, and that Beatson had drawn out for his own purposes, independent of the business, about £4,000. Upon these facts taken from the notes of Lindley, J., before whom, with a jury, the case was tried, that learned judge stated to the jury that the questions for them were, first: "Was the name (Wm. Beatson) put to the bills to denote the firm or to denote William Beatson?" Secondly: "Did the bank take the bills as the bills of the Chemical Works, whoever the proprietors might be, or as the bills of William Beatson only?" The jury retired, and, returning into the court, the foreman stated that as regards the bill for £481. 13s., it having been drawn upon William Beatson at the Chemical Works, Rotherham, the jury agreed that William Beatson's acceptance of it must be held to denote the acceptance of the firm, but that as regards the other bill they found no evidence upon the point. Upon being asked by the learned judge to answer the question as regards that bill according to their judgment, the jury conferred again, and subsequently stated that from the fact of that bill being put in connection with the other they might take it as being the same thing, and to the second question they answered that the bank took the bills as the bills of the Chemical Works. Upon these findings a verdict and judgment was entered for the plaintiffs against the defendant Mycock. That judgment was subsequently set aside, and judgment entered for Mycock, by the Common Pleas Division, upon the ground, stated shortly, that in a case where the name of an individual is the name also of a firm, and that name is put to a bill, the presumption is that the signature is the signature of the individual, and not of the firm; that consequently it lay upon the plaintiffs in this case to displace the presumption by showing the signature to the bills sued upon were respectively the signatures of the firm, and that Beatson was authorized to use the firm's name on the particular occasions and for the particular purposes—in other words, that the bills were given for partnership objects and as partnership acts, and that the plaintiffs had failed to discharge the burden cast upon them. Against the judgment of the Common Pleas Division the present appeal is brought.

In support of the appeal it is contended for the plaintiffs either, first, that where, as this case, a signature is common to an individual and a firm of which the individual is a member, it is open to the bona fide holder for value without notice, whose paper it is, of a bill with

such signature upon it, to sue either the individual or the firm; or, secondly, that if this option is not open to the holder, there is a presumption that the bill was given for the firm and is binding upon it, at least where the individual carries on no business separate from the business of the firm of which he is a member.

As regards the first of these two contentions, we think that it is not a well-founded one. * * * Apart, too, from authority, it appears to us manifestly contrary to true principles of law that the holder of a bill bearing upon it a name which prima facie indicates an individual, and would naturally lead to credit being given to the individual alone, should, upon discovery and proof that there is a firm of which the individual is a member carrying on business under his name, have the right of going against the firm, although at the same time that the proof is given it is proved, also, that the bill was signed by the individual for himself, and not for his firm, and for considerations entirely unconnected with any partnership purpose.

The second contention made on behalf of the plaintiffs is one of more weight, and, apart from the intrinsic importance of the question involved in it, there is an additional importance derived from the fact that, if the contention be correct, it at least displaces the ground upon which the judgment of the court below rests, although it will still remain to be considered whether judgments may or not be rested upon another ground. As a matter of principle, there is considerable force in the arguments both for and against the contention. Against it it is said that when a signature to a bill is of a name, which in itself and prima facie indicates an individual and would lead to credit being given to the individual, and the holder of the bill suing upon it is therefore compelled to give some proof that the name indicates a partnership, it is but just that he should be compelled to go the whole length of proving, not only that a partnership existed under the particular name, and that the individual carried on no business separate from that carried on by the firm, but, further, that the bill was signed by the individual as a partnership act and for partnership objects. In support of the contention it is said that, inasmuch as a bill of exchange is ordinarily used as a trade instrument, there is a presumption that a bill having upon it a name common to the firm and to the individual is a trade bill, and therefore the bill of the firm, in a case where it is proved or admitted that there is no trading in the name except by the firm. In the absence of authority upon this question, our opinion upon it would be in favor of the plaintiffs' contention. In point of convenience and expediency, and in the interests of trade, it has much to support it. The vast majority of bills given under the circumstances supposed would be really partnership bills, and yet it would be often difficult, if not impossible, for the holders of such bills to do more than prove that the only trade carried on under the individual name was the trade of partnership, and if they were compelled to go further, and prove that the particular bill was a

partnership bill, the effect might be that in many cases dormant partners, and in some cases ostensible ones, too, might escape from just liabilities. On the other hand, the partners sought to be made responsible on the bills would in most instances be able to prove whether any particular bill sued on was or was not a partnership bill, and should, as it appears to us, at least have the onus of doing so thrown upon them, when it is through their own act, in allowing the firm name to be the same as that of an individual in the firm, that difficulty and doubt arise.

But in the court below it was considered that the American authorities clearly negative this view, and that the weight of English authorities is in favor of the American view of the law.

We propose to consider first the English authorities. [The court here examines Swan v. Steele, 7 East, 209; Emly v. Lyle, 15 East, 6; Ex parte Bolitho, 1 Buck. 100; Bank of South Carolina v. Case, 8 B. & C. 427; Furze v. Sharwood, 2 Q. B. 388; Nicholson v. Ricketts, 2 E. & E. 497; In re Adansonia Fibre Co., Miles' Claim, L. R. 9 Ch. 635.]

Upon this review of English authorities they appear to support the view that where a name is common to a firm and to an individual member of such firm, and the individual member carries on no business separate from that of the firm, there is a presumption that a bill of exchange drawn, accepted, or indorsed in the common name is a bill drawn, accepted, or indorsed for the partnership, and for which the partnership is liable, and that it lies upon the defendants in an action against the partners upon such bill to get rid of the prima facie case made against them. But as the court below relies much upon the American authorities as uniformly negativing this view, and those authorities have been much discussed in the argument before this court, we think it desirable to refer to them.

[The court here examines Parsons on Bills of Exchange, p. 131; Story on Partnership, pp. 106, 142; Oliphant v. Mathews, 16 Barb. (N. Y.) 608; U. S. Bank v. Binney, 5 Mason (U. S.) 176, 185, Fed. Cas. No. 16,791; Mifflin v. Smith, 17 Serg. & R. (Pa.) 165; Bank of Rochester v. Monteith, 1 Denio (N. Y.) 402, 43 Am. Dec. 681.]

It appears to us, therefore, that the American authorities are in accord with the English upon the point under consideration, and that both fail to support the view taken by the court below, and are in favor of the second contention urged in this case on behalf of the plaintiffs.

Applying, then, the presumption for which the plaintiffs contend to the circumstances of the present case, the matter stands thus: The only business carried on in the year 1878 in the name of and by William Beatson was the business of the partnership, and both the bills sued upon have the appearance of trade bills. Prima facie, then, the bills were bills indorsed and accepted, respectively, in the name and on account of the partnership; and, if that prima facie case were not displaced, Mycock would be liable upon them to the plaintiffs as

bona fide holders for value without notice, even though they were so indorsed and accepted for private purposes of Beatson and in fraud of his partner. The nature of the partnership business was such as to give Beatson, in respect to persons dealing with him in business, an implied authority to bind his partner by bills of exchange, and his partner, although a secret one, must be held responsible upon any bills signed by Beatson in the name of the firm in favor of a holder whose title cannot be impeached, however much Beatson, in signing that name, may have exceeded the authority and broken the trust reposed in him by the agreement of partnership. As was said by the court in giving judgment in the case of Wintle v. Crowther, 1 C. & J. 316, 318: "Where a partnership name is pledged, the partnership, of whomsoever it may consist, and whether the partners are named or not, and whether they are known or secret partners, will be bound, unless the title of the person who seeks to charge them can be impeached." And the authorities generally, both English and American, are uniform in support of this view. There is no difference in this respect between the dormant and the ostensible partner, and, when once it is established that a name common to a firm and an individual member of it has been put to a bill as the name of the firm, there is no difference between the liability of partners carrying on business in a name which bears in itself the stamp and evidence of a partnership. It may, perhaps, be argued that in the latter case the bona fide holder without notice is induced by the name itself to trust the firm, and is therefore entitled to have the responsibility of all the members of that firm, while an individual name would suggest no responsibility other than that of the individual whose name it is; but when it is remembered that firm names are often used by individual traders, while individual names are often used by firms, the argument practically comes to nothing, and a common principle applicable to both cases remains alone consistent with mercantile expediency and general law.

But, assuming that there is no difference as matter of law between the two cases, there is as a matter of evidence a very real and very practical difference. A name in itself indicating a firm does not, except in rare instances, of which the case of Stephens v. Reynolds is an example, leave open any doubt as to the meaning of a signature in such name; but a name which in itself indicates an individual is, notwithstanding the effect of any legal presumption, ambiguous, and there are likely to be few, if any, cases where the decision of the jury or of a court will be rested upon the presumption alone. The present case is no exception to the rule, and the presumption in favor of the plaintiffs, arising from the fact that Beatson carried on no business separate from that of the partnership, sinks into comparative insignificance by the side of the additional facts which are proved in the case. Upon those facts we have to decide, as the courts in Nicholson v. Ricketts, and In re Adansonia Fibre Co., Miles' Case, were called

upon to decide, whether the signature to the bills upon which the dispute arises was intended to denote and did denote the partnership of which the defendant was a member. [After commenting on the evidence the opinion continues:]

Can any inference be reasonably drawn from such evidence than that Beatson, in signing the bills, intended to sign and did sign them for himself? We think that no other inference ought to be drawn, and that the jury, in finding that the signature "William Beatson" upon each of the bills was intended to denote the firm, gave a verdict against the evidence, and one which ought not to stand.

We think that the judgment of the court below should stand, and that the appeal should consequently be dismissed.

Judgment affirmed.

SECTION 3.—PARTNERSHIP PROPERTY.

I. CAPITAL.

DEAN et al. v. DEAN et al.

(Supreme Court of Wisconsin, 1882. 54 Wis. 23, 11 N. W. 239.)

COLE, C. J. This action is brought by the plaintiffs, as executors, to obtain a construction of the codicil to the will of N. W. Dean, who died February 28, 1880. The will was dated February 29, 1876, and makes a full disposition of the testator's estate, both real and personal. * * * There is no controversy as to the proper construction of the will, and we need not further give its provisions. The codicil bears date February 23, 1880. On May 1, 1871, the decedent and his brother, Thaddeus Dean, entered into partnership in the business of dealing in lumber in the city of Chicago, which partnership was continued to the death of N. W. Dean. The will makes no express reference to this partnership business. But the codicil, after reciting that this partnership business had hitherto been profitable to the testator, which was largely due to the business capacity and integrity of his brother Thaddeus, contains this language:

"* * * I hereby direct my said executors to allow my present capital in said business to remain for the period of two years after my decease, collecting and receiving annually, from my said brother Thaddeus, the net profits arising from said business, under my agreement with him, belonging to me, for the benefit of my estate. At the expiration of two years it is my will and I direct that my said executors have a full settlement and accounting with my said brother Thaddeus in relation to said business, and that thereupon they collect and

receive from him one-half of the net value of my interest therein, and upon the payment by him of the one-half value so ascertained I instruct and direct my said executors to execute and deliver to him all proper and necessary assignments and conveyances so as to vest in him absolutely all my right, title, and interest in the business aforesaid; it being my intention, in addition to the bequest heretofore made to him in my said will, to bequeath and devise to him one-half of my entire interest in said business, subject to the limitations and restrictions aforesaid."

The articles of copartnership, to which reference is made in the codicil, are quite full and specific. They provide, among other things, that each partner should contribute $15,000 to the capital of the firm, which was to be used in carrying on the copartnership business; that Thaddeus Dean was to have the management of the business; that he should be entitled to receive two-thirds of the profits, and N. W. Dean one-third thereof. The losses were to be borne in the same proportion. Books of account were to be kept, wherein all of the transactions of the firm should be entered, and which books should be open to the inspection of each partner at all times. By the ninth clause it was provided that N. W. Dean was to take out of the cash of the company's funds $125 per month for his own use, and Thaddeus Dean $250 per month, providing these sums could be so drawn out by the respective parties without impairing the capital of the firm, but neither partner was to take a greater sum for his own use during any month without the written consent of the other. The tenth clause provided that Thaddeus Dean, at the end of each year, and oftener, if need be, on request, should make and render to N. W. Dean a just and true account of all the gains and profits, as well as losses, of the business, and of all things done on behalf of the partnership, and this account being so made he was to pay N. W. Dean his proportionate share of the profits, and take to himself his own share. In the eleventh clause it was provided that during the continuance of the copartnership none of the capital of the firm, nor any of the accrued but undivided gains and profits thereof, should be used or employed by the parties thereto for any other purpose than carrying on said business. In the twelfth, that at the end of the copartnership a final accounting should be had, and all the debts of the firm should be first paid, then each should draw out the amount of capital originally contributed by him, diminished by his proportionate share of losses, if any; the balance, if any, to be divided as provided for dividing profits. These are the material provisions of the copartnership agreement.

From three letters which were introduced on the hearing—one written by Thaddeus Dean; the other two by N. W. Dean—it appears that each party agreed, in July, 1872, to increase its capital to $20,000, and did so. And it further appears, from the annual statement made of the partnership business, that at the end of each partnership year each partner was credited on the books of the concern with his share

of the profits, and was charged with the amount which he had drawn out during the year. The accumulated but undivided profits of the business consisted almost wholly of real estate, lumber, notes, book accounts, and other personal property belonging to the firm. The amount standing to the credit of N. W. Dean at the time of his death, including his capital of $20,000, was $43,478.16. Or, to speak more accurately, that sum embraced the profits standing to the credit of N. W. Dean on the books of the firm at the time of his death, and also the unascertained profits which had accrued since the last annual statement of May 1, 1879, down to that time.

The question arising upon the codicil, which the executors request the aid of the court in determining, is what amount they must leave in the partnership business for two years, and which, at the end of that period, they are directed to assign and convey to Thaddeus Dean upon his paying one-half of its ascertained net value; the annual profits having been collected by them in the meantime. On the part of the residuary legatee Thaddeus Dean it is claimed that it was the intention of the testator that his entire interest in the partnership business should remain in the business, including both his capital of $20,000 and all accumulated but undivided profits belonging to him under the partnership agreement; while, on the part of other residuary legatees, it is insisted that it was his capital only which was to be left in the business. Considerable proof was taken on the hearing relating to the acts of the parties and their course of dealing, for the purpose of aiding the court in arriving at the intention of the testator in making the codicil. But, aside from the articles of copartnership, this evidence furnishes but little assistance in construing the codicil. The intention of the testator must, therefore, be ascertained from the language of the codicil itself, read, of course, in the light of the written agreement to which it refers.

On looking at the language of the codicil itself, the first thing which will be noticed is that the testator, in the introductory part, speaks of his "interest" in the business, which has been profitable to him. Being desirous that the business so commenced should be maintained and carried on, he directs his "executors to allow my present capital in said business to remain for the period of two years after my decease, collecting and receiving annually from my said brother, Thaddeus Dean, the net profits arising from said business under my agreement with him, belonging to me, for the benefit of my estate." It will be seen that the mind of the testator was fixed at the outset upon his entire interest in that business as distinguishable from his capital therein. If he intended that his entire interest should remain, it is singular that he changed his language, using words which convey a different meaning. The terms "interest" and "present capital" are not equivalent expressions, and do not convey the same idea in the connection in which they are used. If the testator intended that his entire interest in the business should remain, it is remarkable that he changed

his phraseology. But this is not all. The executors are directed to collect annually from his brother Thaddeus the net profits arising from the business under the partnership agreement which belonged to him for the benefit of his estate. If the codicil is construed, as it must be, in connection with the partnership agreement, there is no difficulty in getting at the intention of the testator, for the agreement makes a plain and broad distinction between capital and profits. The former is devoted to the use of the partnership business, but provision is made for withdrawing the latter from time to time. Therefore we think that the word "capital," as used in the codicil, must be understood as meaning the same thing as when used in the agreement; it means the capital as opposed to profits, and the word "profits" means the gains upon the capital invested in the business.

The testator further directs that when a final settlement is made or accounting had the executors shall convey to his brother, upon payment by him of one-half of its ascertained value, all his right, title, and interest in the business, declaring that it is his "intention, in addition to the bequest heretofore made to him in my said will, to bequeath and devise to him one-half of my entire interest in said business, subject to the limitations and restrictions aforesaid." If the qualifying words, "subject to the limitations and restrictions aforesaid," were omitted, this clause of the codicil would tend strongly to warrant the inference that it was the intention of the testator that his entire interest in the business should remain for two years, and then be disposed of as directed. But, as the clause stands, in view of the previous language, where the words "interest" and "capital" are used in a different sense, more especially in consideration of the fact that the whole codicil is to be construed in connection with the written agreement, no such inference or presumption can fairly be made; for the agreement, in its terms, so clearly and distinctly discriminates between capital and profits that it is impossible to hold the testator, by the words "my present capital," intended to designate not only the capital proper, which he had contributed to the business, but also all the accumulated and undivided profits which had accrued from the use of that capital. If he had intended to direct that his whole interest in the business should remain two years, or if he regarded his entire assets therein as capital, his intention or understanding would have been made manifest by the use of different language than that employed.

But, as observed by counsel who argue in favor of the view we have taken of the meaning of the codicil, the testator, in the very sentence in which the words "my present capital" occur, directs what shall be done with the "net profits" of the business, and pointedly makes a distinction between capital and profits, thus showing that the two things were separate in his mind. The intention of the testator must prevail if it is possible to gather it from the language of the entire codicil. That intention was to allow his capital to remain in

the business for two years, but nothing more. This construction of the codicil is vigorously combated by the learned counsel for Thaddeus Dean, because, as he says, if the accumulated profits of the parties were withdrawn it would so cripple the business that it could not be carried on with the success and profit which had theretofore attended it. But this argument, under the circumstances, is entitled to but little weight; for if there had been no provision for continuing the business it would have to be closed up on the death of N. W. Dean. Its continuance, therefore, was a favor, and could not have been claimed as a right by the surviving partner. * * *

It results, from the views expressed, that the judgment of the circuit court, placing a construction upon the codicil, and giving directions to the executors in regard to the proper execution of their trust, is erroneous. The judgment must, therefore, be reversed, and the cause be remanded, with directions to enter a judgment in accordance with this opinion.

SHEA v. DONAHUE et al.

(Supreme Court of Tennessee, 1885. 15 Lea, 160, 54 Am. Rep. 407.)

COOPER, J. Bill, among other things, for a partnership account between Shea and Donahue. The capital of the partnership business was contributed exclusively by Shea, and the only question raised by the parties is whether Donahue, upon a settlement, is entitled to one-half of the capital thus advanced. The chancellor decided against Donahue, and he has appealed.

The agreement of partnership, entered into March 21, 1877, provided as follows: "We do hereby agree to become partners as merchants, in making, buying and selling all kinds of tinware, stoves, pumps, etc., in the city of Knoxville, Tennessee, for the term of one year from this date, under the style and firm name of Shea & Donahue. And to constitute a fund for the purpose, Timothy Shea has paid in as stock one thousand dollars, which will constitute a common stook, to be used and employed between us in buying goods, wares and merchandise. John Donahue, being a practical workman, and having considerable experience in the above named business, it is agreed that he will give the business his entire personal attention and the benefit of his experience to place against the cash furnished by said Shea. We are to bear the expenses and losses jointly and share the profits equally. The capital stock is not to be withdrawn by either party until the end of the term, but to be employed as capital unless mutually agreed between us in writing."

The partnership business was in fact carried on for about three years, the agreement only stipulating for one year. The contention of the defendant is that by the terms of the agreement he was entitled at the end of one year to an equal share of the profits of the business and

to one-half of the capital advanced by his partner; and this, although it goes without saying he would retain all his practical experience which was to be placed against the cash furnished by his partner. But the agreement is that the partners are only to "share the profits equally," not the profits and the capital. And the profits of any business are only what remains after deducting debts and expenses and the capital paid in. Lindl. Part. 791, 806. The provision that the capital stock shall constitute a common stock, to be used in buying the materials and wares of their trade, merely designates the mode in which it is agreed that the capital shall be invested. And the further provision that the capital stock shall not be withdrawn by either party until the end of the term was only intended to restrain the partners from drawing funds from the business, so as to trench upon the capital, while the partnership continued. There is nothing in the articles of agreement to take the case out of the ordinary one of a partnership in profit and loss upon unequal capitals.

Of course, the articles of a partnership may expressly provide for an equal division of the assets upon a dissolution, notwithstanding an unequal advance of capitals by the respective partners. The same result may follow a continuous course of dealing upon a basis which implies such equal division; for, if there is no evidence from which any different conclusion as to what was agreed can be drawn, the shares of all the partners will be adjusted equally, upon the favorite maxim of chancery that equality is equity. But, as Mr. Lindley tells us, the rule is when the partners have advanced unequal capitals, and have agreed to share profits and losses equally, without more, each partner is entitled to his advance before division, and a deficiency in the capital must be treated like any other loss, and borne equally by the partners. Lindl. Part. 807.

The only authorities adduced by the learned counsel of the defendants in support of his contention in this case are to the effect that property brought into the partnership business by the members of the firm, or bought with the capital advanced, becomes partnership property, and may be disposed of as such by one of the partners under his general powers as a member of the firm. And so it does beyond all question, for the very object of contributing capital, either in property or money, is to secure a partnership stock for the purpose of carrying on the common business. But this fact has nothing to do with the settlement between the partners of their accounts at the end of the partnership. "By the capital of a partnership," says Mr. Lindley, "is meant the aggregate of the sums contributed by its members for the purpose of commencing or carrying on the partnership business. The capital of a partnership is not, therefore, the same as its property. The capital is a sum fixed by the agreement of the partners, whilst the actual assets of the firm vary from day to day, and include everything belonging to the firm and having any money value. Moreover, the capital of each partner is not necessarily the amount due to him from the firm; for

not only may he owe the firm money, so that less than his capital is due to him, but the firm may owe him money in addition to his capital—e. g., for money loaned. The amount of each partner's capital ought, therefore, always to be accurately stated, in order to avoid disputes upon a final adjustment of accounts; and this is more important where the capitals of the partners are unequal, for, if there is no evidence as to the amounts contributed by them, the share of the whole assets will be treated as equal." Lindl. Part. 610. The same author adds in another place: "When it is said that the shares of partners are prima facie equal, although their capitals are unequal, what is meant is that losses of capital, like other losses, must be shared equally; but it is not meant that on a final settlement of accounts capitals contributed unequally are to be treated as an aggregate fund which ought to be divided between the partners in equal shares." Lindl. Part. 67. On the contrary, in his chapter devoted to Partnership Accounts, he expressly tells us that the assets of a partnership should be applied as follows: "(1) In paying the debts and liabilities of the firm to non-partners; (2) in paying to each partner ratably what is due from capital; (3) in paying to each partner ratably what is due from the firm to him in respect of capital; (4) and the ultimate residue, if any, will then be divisible as profits between the partners in equal shares, unless the contrary can be shown." Lindl. Part. 806.

In accordance with these principles, the following decision has been made by the Supreme Court of New York in a case cited in a note to page 610 of Lindley on Partnership: "Where by the terms of the agreement the defendant furnished the capital stock, and the plaintiff contributed his skill and services, and the profits of the copartnership were to be equally divided, the plaintiff is not entitled to any part of the capital stock on a settlement of the affairs of the partnership. He has no interest in any part of the capital, excepting so far as in the progress of the business the same may have been converted into profits." Conroy v. Campbell, 13 Jones & S. (N. Y.) 326. The case, it will be noticed, is exactly in point. And to the same effect in principle are Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311, Knight v. Ogden, 2 Tenn. Ch. 473, and Shepherd, Ex parte, 3 Tenn. Ch. 189. No case has been found to the contrary.

Affirm the chancellor's decree.

Decree affirmed.

II. Property Other than Capital.

ROBINSON BANK v. MILLER et al.

(Supreme Court of Illinois, 1894. 153 Ill. 244, 38 N. E. 1078, 27 L. R. A. 449, 46 Am. St. Rep. 883.)

John Newton, John S. Emmons, and Frank O. Miller, having each acquired, with individual funds, a one-third interest in a certain parcel of land containing four acres, entered into an oral agreement of partnership to engage in the business of milling and of buying and selling grain. The business of the firm was done in a mill on said land. John S. Emmons executed two mortgages on his one-third interest in the land—one to Willis Emmons to secure him as surety on a note of John S. Emmons, and the other to Wiley S. Emmons and William W. Walter to secure them as sureties on another note of John S. Emmons. Frank O. Miller also executed a mortgage on his one-third interest to one Lamport. The Robinson Bank, a creditor of the firm of Newton, Emmons & Miller, claims that the mill property and the land upon which the mill stands was partnership property belonging to Newton, Emmons & Miller as partners; that the individual creditors of Miller and John S. Emmons, such as Willis Emmons, Wiley S. Emmons, and William W. Walter, were only entitled to such surplus as might arise out of the mill property after the payment of the firm debts therefrom. The bank filed a bill seeking to have the mortgages to Wiley S. Emmons, William W. Walter, and Willis Emmons, and to Lamport, set aside. Said mortgagees filed cross-bills asking for the foreclosure of their respective mortgages. In the circuit court the mortgages by John S. Emmons were held to be valid, and a foreclosure was decreed. The mortgage to Lamport was set aside for fraud. This was an appeal by the bank and by Lamport. The validity of the mortgages depends on whether the land on which they were given was the property of the mortgagors individually or whether it belonged to the partnership.

Magruder, J. * * * Whether real estate upon which a partnership transacts its business is firm property or the property of the individual members of the firm is oftentimes a difficult question to determine, and one upon which the authorities are not altogether uniform. The mere fact of the use of land by a firm does not make it partnership property. Geopper v. Kinsinger, 39 Ohio St. 429; Hatchett v. Blanton, 72 Ala. 423. Nor is real estate necessarily the individual property of the members of a firm because the title is held by one member, or by the several members in individual interests. 1 Bates, Partn. § 280. Whether real estate is partnership or individual property depends largely upon the intention of the partners. That intention may be expressed in the deed conveying the land, or in the articles of partnership; but when it is not so expressed the circumstances usually relied upon to determine the question are the ownership of the

funds paid for the land, the uses to which it is put, and the manner in which it is entered in the accounts upon the books of the firm. 1 Bates, Partn. § 280; 2 Lindl. Partn. marg. p. 649; 17 Am. & Eng. Enc. Law, p. 945, and cases in note. Where real estate is bought with partnership funds for partnership purposes, and is applied to partnership uses, or entered and carried in the accounts of the firm as a partnership asset, it is deemed to be firm property; and in such case it makes no difference, in a court of equity, whether the title is vested in all the partners, as tenants in common, or in one of them, or in a stranger. T. Pars. Partn. (4th Ed.) § 265; 1 Bates, Partn. § 281; Johnson v. Clark, 18 Kan. 157; 17 Am. & Eng. Enc. Law, p. 948, and cases cited. If the real estate is purchased with partnership funds, the party holding the legal title will be regarded as holding it subject to a resulting trust in favor of the firm furnishing the money. In such case no agreement is necessary, and the statute of frauds has no application. Parker v. Bowles, 57 N. H. 491; 1 Bates, Partn. § 281.

In the case at bar the land was not purchased with partnership funds. The undivided one-third interest bought by John S. Emmons was paid for by him with his own individual money. Miller also paid for the one undivided one-third interest, purchased by him with his individual funds. None of the money of the firm of Newton, Emmons & Miller was contributed towards the purchase of the one-third interest held by Newton. Indeed, the proof shows that the firm of Newton, Emmons & Miller was formed by an oral agreement after Emmons and Miller had bought their interests. Each partner here held the title to an undivided one-third part of the property. No entries were made upon the books of the firm showing that the real estate was treated as firm assets. The evidence, however, does show that the property was bought for the purpose of being used in the milling business, and that after its purchase it was used for firm purposes, and that the firm gave its notes to pay for repairs, and for placing new machinery in the mill upon the premises. Under these circumstances, was the land partnership property, or the individual property of the partners, holding as tenants in common? It cannot be said that the land is firm property, upon the theory of a resulting trust, because the money of the firm was not used to buy the property. Such a trust might exist in favor of the firm, regarding it as a person, if the partners had taken the legal title, and the firm had advanced the purchase money. The trust must arise at the time of the execution of the conveyance, and when the title vests in the grantee. Such could not have been the case here, under the facts stated. Van Buskirk v. Van Buskirk, 148 Ill. 9, 35 N. E. 383. In view of the fact that the land was bought with individual, and not partnership, funds, and was conveyed in undivided interests to the several partners, and in the absence of any agreement that it should be regarded as firm property, does the conduct of the parties in afterwards forming a partnership, and using the property for partnership purposes, and repairing and improving the mill at the

expense of the firm, make the land firm property, in a court of equity? A negative answer to this question is found in many of the authorities, as will be seen by reference to the following: Alexander v. Kimbro, 49 Miss. 529; Theriot v. Michel, 28 La. Ann. 107; Reynolds v. Ruckman, 35 Mich. 80; Parker v. Bowles, 57 N. H. 491; Thompson v. Bowman, 6 Wall. (U. S.) 316, 18 L. Ed. 736; Frink v. Branch, 16 Conn. 260; Wheatley's Heirs v. Calhoun, 12 Leigh (Va.) 264, 37 Am. Dec. 654; Sikes v. Work, 6 Gray (Mass.) 433; Gordon v. Gordon, 49 Mich. 501, 13 N. W. 834; Moody v. Rathburn, 7 Minn. 89 (Gil. 58); Paige v. Paige, 71 Iowa, 318, 32 N. W. 360, 60 Am. Rep. 799; T. Pars. Partn. (4th Ed.) § 266; Hatchett v. Blanton, supra.

The general doctrine of all these cases is that a purchase of the land with partnership funds is necessary to make it firm property. T. Parsons, in his work on Partnership (4th Ed.), says: "Although it [real estate] be held in the joint name of two or more persons, if there be no proof that it was purchased with partnership funds for partnership purposes, it will be considered as held by them as joint tenants or tenants in common. * * * So, if not paid for by partnership funds, then it is probably his property who does pay for it, whatever use he permits to be made of it." Sections 265, 266. In Hatchett v. Blanton, supra, the Supreme Court of Alabama say: "Steering clear of all cases of fraud, or of the use by one partner, without the approbation of his associates, of partnership funds in the acquisition of real estate, the two facts must concur to constitute real estate partnership property—acquisition with partnership funds, or on partnership credit, and for the uses of the partnership." In Thompson v. Bowman, supra, the Supreme Court of the United States say: "In the absence of proof of its purchase with partnership funds for partnership purposes, real property standing in the names of several persons is deemed to be held by them as joint tenants or as tenants in common." Buchan v. Sumner, 2 Barb. (N. Y.) 165, 47 Am. Dec. 305. The theory of some of the cases is that real estate bought with separate, and not partnership, funds, cannot be converted into firm property by a verbal agreement between the partners, because no trust can be created in lands, unless by writing, in view of the statute of frauds, except such as results by implication of law. Parker v. Bowles, supra. There are cases which hold that, even though the land was originally bought by the several partners with their individual funds, and deeded to them as tenants in common, yet it will be regarded in equity as firm property where it is improved out of partnership funds for firm purposes, and actually used for such purposes, or where the firm puts valuable and permanent improvements upon it for firm purposes, and which are essential to the firm. In some instances the land is held to be the property of the partners, and the improvements to be the property of the firm. 1 Bates, Partn. §§ 281, 282. The use of the property is not conclusive of its character as real estate or per-

sonalty, but is only evidence of the intention of the parties. Id. § 285. When the intention of the partners to convert the land into firm property is inferred from circumstances, the circumstances must be such as do not admit of any other equally reasonable and satisfactory explanation. T. Pars. Partn. § 267. And, where it is sought to show a conversion of the land into personalty by agreement of the partners, such agreement must be clear and explicit. 17 Am. & Eng. Enc. Law, p. 954, and cases cited. In Alkire v. Kahle, 123 Ill. 496, 17 N. E. 693, 5 Am. St. Rep. 540, land was conveyed during the existence of the partnership to "Cato Abbott and Henry Robinson, composing the firm of Abbott & Robinson," and it was held not to be partnership property, because it was not shown to have been either purchased with partnership funds, or used for partnership purposes; but we do not regard that case as holding that the mere use of the land for partnership purposes constitutes it firm property. In Mauck v. Mauck, 54 Ill. 281, land which had been bought and held for firm purposes was said to be firm property, and to partake of the character of personalty; but in that case a part of the business of the firm was to buy and sell real estate, and, although the land was said to belong to the firm, it does not appear that it was not purchased with partnership funds. In Faulds v. Yates, 57 Ill. 416, 11 Am. Rep. 24, the land was bought for the use of the partnership, but after the partnership was formed, and with the money of two of the partners. In Bopp v. Fox, 63 Ill. 450, land, bought by four partners with their individual funds, and conveyed to them in their individual names, was held to be partnership property, because, two weeks before the purchase, the four purchasers made, not a mere executory agreement to form a partnership at a future time, but a "present, verbal agreement of partnership," and then afterwards bought the land, and began the erection of a mill for the purpose of carrying on the milling business as a firm "already formed under the verbal agreement." It was there held that the essential question was whether the purchase money "was paid as partnership money for a partnership purpose," and we said, "We consider this was essentially a purchase with partnership funds for partnership purposes."

The weight of authority seems to us to support the position that where persons who afterwards become partners buy land in their individual names and with their individual funds, before the making of a partnership agreement, the land will be regarded as the individual property of the partners, in the absence of a clear and explicit agreement subsequently entered into by them to make it firm property, or in the absence of controlling circumstances which indicate an intention to convert it into firm assets. We do not think that an application of this rule to the facts of the present case shows the real estate here in controversy to be firm property. * * *

Decree affirmed.

STUMPH et al. v. BAUER et al.

(Supreme Court of Indiana, 1881. 76 Ind. 157.)

Replevin for six barrels of whisky seized by the defendant Pressley, sheriff, on an execution in favor of defendant Bauer, on a judgment obtained by Bauer against Stumph. Prior to the rendition of said judgment, Stumph had entered into a partnership with one Ross. Stumph furnished all the capital and owned all of the stock of the partnership. Ross contributed his labor and experience, and had a "working interest" only, and received a share of the profits. The lower court found for the defendants. Plaintiffs appeal.

Best, C. * * * If the property in question was partnership property, its seizure was unlawful, and the appellants were entitled to recover. On the other hand, if the property belonged to Stumph, the levy was lawful, and the judgment was right. Did the property belong to Stumph? This depends upon their contract. By its terms Stumph was to furnish all the capital, own all the stock, and give his attention to the business. Ross was to contribute his labor and experience, and was to have a third of the net profits. This property was a part of the stock. By the contract Stumph did not put this property into the firm, if one was formed, as partnership property, nor part with its title, but, on the contrary, retained it himself. By express stipulation his title to the property was the same after as before he made the contract, and Ross had no greater or different interest in the property than he would have had, had he engaged to render the same services for a like compensation. Ross was not to own the property, nor any interest in it, nor was it to belong to the firm. True, if it had been sold, he would have been entitled to one-third of the net profits, and so he would have been, had he been employed to render such services for such compensation. Had Stumph put this property into the firm, and Ross his labor and experience, the profits to be divided in the proportion named, the property would have been partnership property. But this was not done. On the contrary, Stumph retained it, stipulating that he himself should own it, and this stipulation fixes the relation of these parties to this property. As between them, Stumph owns the property, and any right that he can assert to it against Ross can be asserted against him by the individual creditors of Stumph.

Again, the conclusion that this property is the individual property of Stumph is strengthened by the stipulation in the contract that Ross' interest is a "working interest," viz., one-third of the net profits. Stumph furnished everything, owns everything, and Ross has a "working interest." What is that but a compensation for his services? Why call it a "working interest," if that was not a compensation for his work? This language is significant. It is in harmony with the clause providing that Stumph should own the stock, and both clauses are ut-

terly inconsistent with the position that Stumph put the property into the firm and that it became partnership property. If, then, the "working interest" of Ross was a mere compensation for his services, the fact that it consisted of one-third of the net profits did not make him a partner. Keiser v. State, 58 Ind. 379.

Again, by the terms of this contract the relation between these parties may be discontinued at any time. When this relation ceases, what becomes of this property? Must it be converted, and an accounting had? Under such circumstances, would any one suppose that it must be disposed of as partnership property, or doubt that Stumph is its absolute owner? We think not.

The appellants also insist that, under the facts found, Ross is liable as a partner, and therefore he is entitled to hold the partnership property until all partnership liabilities are extinguished, so as to protect himself. The answer to this position is that it assumes the very fact in dispute, viz., that this is partnership property. If it is not, neither Ross, nor any one claiming through him, has any lien upon it, whatever his liabilities may be to third parties. * * *

We do not hold that Ross is not liable as a partner to third persons, but hold that the property levied upon was liable to be seized and sold to satisfy Stumph's individual debt, and therefore think the judgment should be affirmed.

Per Curiam. It is therefore ordered, upon the foregoing opinion, that the judgment be, and it is hereby, affirmed, at appellants' costs.[1]

[1] "The mere use of the property by the partnership did not impress upon it the character of partnership property. It is not an uncommon occurrence that a partnership uses the property of its several members, or of a preceding partnership. In the absence of an agreement that the property shall become joint property, its title and character is unchanged." Per Brickell, C. J., in Hatchett v. Blanton, 72 Ala. 423, 435 (1882).

In Foster v. Sargent, 72 N. H. 170, 55 Atl. 423 (1903), the court said: "The question * * * is whether individual or firm creditors shall have priority in certain real estate * * * acquired with partnership funds. * * * It is * * * contended that, although * * * obtained with partnership property, still it cannot be so regarded, * * * because it has 'never been used in any way in the partnership business, but has been rented to others.' * * * In Collumb v. Read, 24 N. Y. 505, the court says: 'Where the land was not purchased for partnership uses, and there was no agreement making it partnership property, and yet it was paid for out of funds of the partnership, or taken in payment of debts due it, the question between the two classes of creditors would be one of construction as to the intent of the partner in making the purchase. It might be that such a purchase would be made as an investment of realized profits. If, for instance, the purchase price should be charged to the separate accounts of the partners, that would be an indication that it was considered by them as an application of divided profits. If, on the other hand, the income should be carried into the books of the copartnership, or if the land itself should be included in the periodical inventories of stock in trade, there would be an inference more or less strong that it had been agreed to hold the estate as partnership property. * * * Where the price of land * * * is paid by copartnership money or effects, or it is taken in satisfaction of a debt due the concern, the real estate becomes partnership property, or is individual property, * * * as the intention of the purchasers shall appear to have been. It may be either one or the other.'"

III. Good Will.

WILLIAMS et al. v. FARRAND et al

(Supreme Court of Michigan, 1891. 88 Mich. 473, 50 N. W. 446, 14 L. R. A. 161.)

McGrath, J. Complainants and defendants had been for some years engaged as wholesale druggists on Larned Street East, in the city of Detroit, as copartners, under the name and style of Farrand, Williams & Co. There were no articles of copartnership, and no term fixed for which the partnership was to continue. Prior to the taking of the annual inventory in January, 1890, defendant Jacob S. Farrand expressed to complainant Sheley a desire to dissolve the copartnership. Mr. Sheley declined to say anything until the annual inventory should be taken, and the business of the year settled up. On the 25th of January, 1890, after the completion of the inventory, defendants made a proposition in writing to "pay Messrs. Sheley & Brooks, for their interest in the firm of Farrand, Williams & Co., for the amount of their interest, being fifty thousand dollars, ($50,000,) the sum of sixty thousand dollars, ($60,000,) or they will take for their interest, the amount being one hundred thousand dollars, ($100,000,) the sum of one hundred and twenty thousand dollars, ($120,000,) the sum to be paid in cash, or in notes acceptable to the parties who sell, one week from to-day, Saturday, the first day of February next. The store to be leased to the party purchasing for a term of five years, at a rent of eight thousand dollars ($8,000) a year, and the warehouse to be rented to the party purchasing, at a net rental of 6% a year on the cost of their interest therein." On the following Monday Mr. Sheley accepted defendants' offer to sell, and on the 1st day of February following a bill of sale was prepared, reciting, among other things, that defendants, in consideration of the sum of $120,000, paid to them by Alanson Sheley, party of the second part, "have bargained and sold unto the said party of the second part all our right, title, and interest to the within-mentioned resources of said firm, including the good will attendant upon the business." This bill of sale was not executed, objection being made to the clause, "including the good will attendant upon the business," and a new instrument was prepared, reciting that defendants, parties of the first part, "for and in consideration of the sum of one hundred and twenty thousand dollars, to them paid by Alanson Sheley, of the second part, have bargained and sold, and by these presents do grant and convey, unto the said party of the second part, his executors, administrators, or assigns, all our right, title, and interest in the firm of Farrand, Williams & Company." This instrument was executed, the insurance policies were assigned by Farrand, Williams & Co. to Williams, Sheley & Brooks, and an agreement to assume and pay all the debts of the old firm was executed by Williams,

Sheley & Brooks, and delivered to defendants. Defendants afterwards formed a copartnership under the firm name of Farrand, Williams & Clark, and opened a wholesale drug establishment at No. 32 Woodward avenue. Complainants adopted the name and style of Williams, Sheley & Brooks; posted their firm name, as successor to Farrand, Williams & Co., over their place of business; had the words "Williams, Sheley & Brooks, Successors to" printed in red ink over the words "Farrand, Williams & Co." wherever the latter appeared upon letter heads, bill heads, labels, and on other stationery; advertised themselves in the newspapers and trade journals as Williams, Sheley & Brooks, successors to Farrand, Williams & Co.; and sent out circulars to the trade containing not only their firm name, but the names of the individual members of the firm. Defendants also extensively advertised the new enterprise through the same mediums, calling special attention to the names of the members of the new firm, their long connection with the drug business, and the dissolution of the old firm, and soliciting trade.

The complainants contend that the assignment by defendants of all interest in the business carried with it the good will of the business, and, having purchased the good will of that business, they are entitled to the exclusive use of the old firm name; that, while defendants have the right to engage in the same line of business, they have not the right to such collocation of their own names as will produce confusion, attract customers, and secure orders, letters, and goods intended for the old firm; that defendants have no right to simulate their labels, to solicit their customers, or entice away their employés. "Good will" has been defined by this court to be "the favor which the management of a business wins from the public, and the probability that old customers will continue their patronage." Chittenden v. Witbeck, 50 Mich. 401, 15 N. W. 526. Lord Eldon, in Cruttwell v. Lye, 17 Ves. 335, defined it as simply the probability that old customers will resort to the old place.

The following propositions must be regarded as established by the clear weight of authority:

1. Though a retiring partner may have assigned his interest in the partnership business, including the good will thereof, to his copartner, he may, in the absence of an express agreement to the contrary, engage in the same line of business in the same locality, and in his own name.

2. He may, by newspaper advertisements, cards, and general circulars, invite the general public to trade with him, and through the same mediums advertise his long connection with the old business, and his retirement therefrom.

3. He will not be allowed, however, to use his own name, or to advertise his business, in such a way as to lead the public to suppose that he is continuing the old business; hence, will not be allowed to advertise himself as its successor.

4. The purchaser will not, in the absence of an express agreement, be allowed to continue the business in the name of the old firm.

5. That no man has a right to sell or advertise his own business or goods as those of another, and so mislead the public, and injure such other person. * * *

6. That when an express contract has been made to remain out of business, or for the use by a purchaser of a fictitious name, or a trade-name, or a trade-mark, the courts will enjoin the continued violation of such agreement. * * *

7. That an assignment of all the stock, property, and effects of a business, or the exclusive right to manufacture a given article, carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trade-marks and trade-names as have been in use in such business. These incidents attach to the business or right of manufacture, and pass with it. Courts have uniformly held that a trade-mark has no separate existence; that there is no property in words, as detached from the thing to which they are applied; and that a conveyance of the thing to which it is attached carries with it the name. * * *

8. A corporate name is regarded as in the nature of a trade-mark, even though composed of individual names, and its simulation may be restrained. After adoption it follows the corporation. Statutes providing for the organization of corporations usually prohibit the adoption of the same name by two companies. Holmes v. Manufacturing Co., 37 Conn. 278, 9 Am. Rep. 324. These propositions are sustained by a long line of authorities, but in none of the cases cited does the question hinge upon a grant of good will. Complainants insist, however, that a grant of good will may be implied, and, when express or implied, it imposes certain restraints upon the vendors, viz.: (1) That they cannot afterwards personally solicit customers of the old firm, and (2) that they are restricted in the use that may be made of their own names.

1. The doctrine that a retiring partner, who has conveyed his interest in an established business, whether the good will be included or not, cannot personally solicit the customers of the old firm, has no support in principle. A retiring partner conveys, in addition to his interest in the tangible effects, simply the advantages that an established business possesses over a new enterprise. The old business is an assured success, the new an experiment. The old business is a going business, and produces its accustomed profits on the day after the transfer. It is capital already invested, and earning profits. The continuing partner gets these advantages. The new business must be built up. The capital taken out of the old concern will earn nothing for months, and in all probability the first year's business will show loss instead of profit. For a time at least it is capital awaiting investment, or invested, but earning nothing. The retiring partner takes these chances or disadvantages. He does not agree that the benefit derived from his connection with that business shall continue. He

does not agree that the old business shall continue to have the benefit of his name, reputation, or service; nor does he guaranty the continuance of that patronage which may have been attracted by his name or reputation. He does not pledge a continuance of conditions. He takes out of the business an element that has contributed to the success of that business. He sells only those advantages and incidents which attach to the property and location, rather than those which attach to the person of the vendor. T. Pars. Partn. *409. He sells only so much of the custom as will continue in spite of his retirement and activity. He sells probabilities, not assurances. It is urged that by the solicitation of the customers of the old firm he is endeavoring to impair the value of that which he has sold, but every act of his in the direction of the establishment of the new business tends to divert the customers of the old firm. The right to enter into the same line of business in the same locality (next door if you please), to advertise his former connection with the old business, and to solicit generally the patronage of the public, is conceded by the clear weight of authority. The exercise of these rights necessarily involves the diversion of custom to the new firm. Does not the right to again engage in the same line of business include all of the incidents of that right? Upon what principle is the line arbitrarily drawn at the personal solicitation of the customers of the old firm? The right to engage in business in his own name attaches to the retiring partner, and, unless expressly so agreed, there is no restraint upon that right. In the present case, Jacob S. Farrand had been at the head of the old house for half a century. His name could not be subsequently used in the same line of business without attracting the attention of the entire trade, nor without affecting the probabilities of a continuance of the patronage of the old house. He gave no hint that he did not intend to again engage in business. All of the circumstances pointed in the direction of a new business. The retirement was not of Jacob S. Farrand alone, but of his son-in-law and Mr. Clark also. The proposition made to complainants was not only to sell, but to buy. In Ginesi v. Cooper, 14 Ch. Div. 596, the court went so far as to insist that a retiring partner had no right to deal with the customers of the old firm; but that rule would operate as a restriction upon the public, and the case is without support in that respect. In Labouchere v. Dawson, L. R. 13 Eq. 322, the court say that a retiring partner who sells the good will of a business is entitled to engage in a similar business, may publish any advertisement he pleases in the papers, stating that he is carrying on such a business; he may publish circulars to all the world, and say that he is carrying on such a business; but he is not entitled, by private letter, or by visit by himself or agent, to solicit the customers of the old firm. But in Pearson v. Pearson, 27 Ch. Div. 145, Labouchere v. Dawson is expressly overruled. The court say: "The case of the plaintiff is founded on contract, and the question is, what are his rights under the contract? There is no express covenant not to

solicit the customers of the old business, but it is said that such a covenant is to be implied. I have a great objection to straining words so as to make them imply a contract as to a point upon which the parties have said nothing, particularly when it is a point which was in their contemplation. It is said that there was a sale of the good will. I think that there was, taking good will as defined by Lord Eldon in Cruttwell v. Lye, 17 Ves. 335. The purchaser has a right to the place and a right to get in the old bills; so the purchaser gets the good will, as defined by Lord Eldon. But the term 'good will' is not used; and when a contract is sought to be implied we must not substitute one word for another. But suppose the word did occur, what is the effect of the sale of 'good will'? It does not, per se, prevent the vendor from carrying on the same class of business." Vernon v. Hallam, 34 Ch. Div. 752, held that a covenant by a vendor of a business, including the good will thereof, that he would not for a term of years carry on the business of a manufacturer, either by himself or jointly with any other person, under the name or style of J. H. or H. Bros. (the name of the business which he had sold), is not a covenant that the vendor would not carry on business as a manufacturer, but against using a particular name or style in trade, and the injunction was granted to restrain a breach of that covenant. The court say: "When a vendor sells his business, and commences a similar business in the same locality, and solicits customers of the old house to deal with him, the court, following the decision in Pearson v. Pearson, and being of opinion that the case of Labouchere v. Dawson had been overruled by the decision in that case, refused to grant an injunction to restrain such solicitation." Leggott v. Barrett, 15 Ch. Div. 306, Ginesi v. Cooper, 14 Ch. Div. 596, and a number of other cases cited, follow Labouchere v. Dawson.

The correct rule is, we think, laid down in Cottrell v. Manufacturing Co., 54 Conn. 138, 6 Atl. 791. The court say: "Cottrell did not require Babcock to agree, and the latter did not agree, to abstain from the manufacturing of printing presses. By purchasing the good will merely Cottrell secured the right to conduct the old business at the old stand with the probability in his favor that old customers would continue to go there. If he desired more, he should have secured it by positive agreement. The matter of good will was in his mind. Presumptively he obtained all that he desired. At any rate, the express contract is the measure of his right; and since that conveys a good will in terms, but says no more, the court will not upon inference deny to the vendor the possibility of successful competition by all lawful means with the vendee in the same business. No restraint upon trade may rest upon inference. Therefore, in the absence of any express stipulation to the contrary, Babcock might lawfully establish a similar business at the next door, and by advertisement, circular, card, and personal solicitation invite all the world, including the old customers of Cottrell & Babcock, to come there and purchase of him; being very careful always when

addressing individuals or the public, either through the eye or the ear, not to lead any one to believe that the presses which he offered for sale were manufactured by the plaintiffs, or that he was the successor to the business of Cottrell & Babcock, or that Cottrell was not carrying on the business formerly conducted by that firm. That he may do this by advertisements and general circulars courts are substantially agreed, we think. But some have drawn the line here and barred personal solicitation. They permit the vendor of a good will to establish a like business at the next door, and by the potential instrumentalities of the newspapers and general circulars ask old customers to buy at the old place, and withhold from him only the instrumentality of highest power, viz., personal solicitation. To deny him the use of the newspapers and general circulars is to make successful business impossible, and therefore is to impose an absolute restraint upon the right to trade. This the courts could not do, except upon express agreement. But possibly the old customers might not see these; and in some cases, the courts have undertaken to preserve this possibility for the advantage of the vendor, and found a legal principle upon it. Other courts have been of the opinion that no legal principle can be made to rest upon this distinction; that to deny the vendor personal access to old customers even would put him at such disadvantage in competition as to endanger his success; that they ought not upon inference to bar him from trade, either totally or partially; and that all restraint of that nature must come from his positive agreement. And such, we think, is the present tendency of the law." Good will may be said to be those intangible advantages or incidents which are impersonal, so far as the grantor is concerned, and attach to the thing conveyed. Where it consists of the advantages of location, it follows an assignment of the lease of location. Again, it may not depend at all upon location, as in the case of a newspaper, and it would follow an assignment of all interest in the plant, property, effects, and business. A partnership may become impersonal, after the death of the partners, and it is then treated like a fictitious or corporate name. A surname may become impersonal when it is attached to an article of manufacture, and becomes the name by which such article is known in the market, and the right to use the name may in consequence follow a grant of the right to manufacture that article, or a sale of the business of manufacturing such article; and where the right to manufacture is exclusive, the right to the use of the name as applied to that article becomes likewise exclusive. It appears, however, that in the first bill of sale which was prepared the words, "including the good will attendant upon said business," were inserted, but were objected to, stricken out, and a new bill of sale prepared, omitting any reference to good will. But it is said that this clause was objected to because, in the opinion of the objector, it might preclude him from engaging in the same business, whereas, under the law, he would have such a right had the clause remained. The only use, however, which com-

plainants now propose to make of the clause, treated as a part of the instrument, is to restrict that right to engage in business by taking away one of its incidents. Adopting the language used in Churton v. Douglas, Johns. Eng. Ch. 174, with reference to the right of plaintiff to continue the use of the old firm name, "I think the defendant is fully entitled to the benefit of the observation that it was proposed to him to insert such a provision, and that he refused it. I think, therefore, that this case goes a step higher than the authorities, and the defendant is entitled to put his case in the highest possible form with regard to his right" to engage in the same line of business.

II. The next question relates to the use by defendants of the firm name of Farrand, Williams & Clark. It is clear that complainants have no right to continue their business under the old firm name. The rule that upon a dissolution of a firm neither partner has the right to use the firm name, as well as the other rule that a retiring partner has no right to use the old firm name, are both subject to the exception that a person has the right to use his own name unless he has expressly covenanted otherwise. In case A. B. should sell out his business to C. D., in the absence of a grant to C. D. of the right to use the name of A. B., or an agreement to the contrary, is there any doubt but that A. B. would have the right to engage in the same line of business in his own name? In that case, such a probability would naturally suggest itself to C. D., and if he desired to get the advantage of A. B.'s abstinence from business, he would insist upon an agreement to that effect. In the present case, Mr. Farrand's name had been at the head of the firm name for nearly half a century, and the name of another of the retiring members corresponded with the only other surname used in the old firm name. It must have been evident to complainants that in any event the name of the new firm would be similar to that of the old firm. If complainants desired any protection against such a use of the names of the retiring members, they should have inserted a provision to that effect in the bill of sale. The right to continue the use of a firm name, as well as a restriction upon the use by a retiring partner of his own name, are proper subjects of bargain, sale, and agreement. Here neither have been purchased. Complainants have purchased the business of the old firm. They have the right to advertise themselves as succeeding to and continuing that business. The exercise of such a right does not conflict with any right reserved by defendants. Complainants, by such a holding out, commit no fraud, misrepresentation, or deception. They publish the truth only. Defendants have the right to use their own names, or any collocation of their own names. They have not adopted the old firm name, although it would have been appropriate. They have adopted no fictitious name. There is no deception in the use of the name adopted by them. The business of the old firm is a separate and distinct business. Defendants have no right to advertise their business as a continuation of the old firm business. They are subject to the

rule already laid down, that no man has the right to sell or advertise his own goods or business as that of another, and so mislead the public and injure such other person. In Lathrop v. Lathrop, 47 How. Prac. (N. Y.) 532, after dissolution J. Lathrop formed a copartnership with one Tisdale, and adopted the name of J. Lathrop & Co., which was the style of the old firm. Held that, in the absence of any covenant with his late partner, he might legally do so. In Reeves v. Denicke, 12 Abb. Prac. (N. S.) [N. Y.] 92, the court say: "In this case, the firm name was not sold or transferred to defendants as constituting a part of the partnership property; nor did the sale, in terms or by necessary implication, include the good will; and it is therefore unnecessary to determine whether the partnership name was a part of such good will. There was no restraint upon a retiring partner holding him from engaging in a similar business; and he violated no obligation by forming a new firm under his own name, and transacting a business in all respects like that he had released to them. It is quite clear that defendants acquired no right to continue the use of the partnership name of the old firm. If the good reputation of that firm was intended to pass and become a part of defendant's new firm, it should have been provided for in the conveyance. That it was not intended it should pass is evident from the omission to include it." Iowa Seed Co. v. Dorr, 70 Iowa, 481, 30 N. W. 866, 59 Am. Rep. 446; Bassett v. Percival, 5 Allen (Mass.) 345; McGowan Bros. Pump & Machine Co. v. McGowan, 22 Ohio St. 370. In Turton v. Turton, 42 Ch. Div. 128, although there were no contract relations between the parties, the court say: "No man can have the right to represent his goods as the goods of another; therefore, if a man uses his own name, that is no prima facie case, but if he, besides using his own name, does other things which show that he is intending to represent, and is in point of fact making his goods represent, the goods of another, then he is so prohibited; but not otherwise." In Hookham v. Pottage, L. R. 8 Ch. App. 91, plaintiff and defendant had been copartners as Hookham & Pottage. Plaintiff succeeded to the business, and defendant afterwards set up a shop only a few doors away, and printed over the door the words, "Pottage, from Hookham & Pottage." The court held that "defendant had a right to state that he was formerly manager, and afterwards a partner, in the firm of Hookham & Pottage, and that he had a right to avail himself by the statement of that fact of the reputation which he had so acquired, but that he had no right to make that statement, or to avail himself of that reputation, in such a way as was calculated to represent to the world that the business which he was carrying on was the business of Hookham & Pottage, or that Hookham had any interest in it." In Meneely v. Meneely, 62 N. Y. 431, 20 Am. Rep. 489, the court say: "If defendants were using the name with the intention of holding themselves out as the successors of Andrew Meneely, and as the proprietors of the old established foundry which was being conducted by plaintiffs, and thus enticing away customers, and if with that

intention they used the name in such a way as to make it appear that of the plaintiffs' firm, or resorted to any artifice to induce the belief that defendants' establishment was the same as that of plaintiffs, and, perhaps without actual fraudulent intent, they had done acts calculated to mislead the public as to the identity of the establishment, and produce injury beyond that which resulted from similarity in name, then the court would enjoin them, not from the use of the name, but from using it in such a way as would deceive the public. * * * Every man has the absolute right to his own name in his own business, even though he may thereby interfere with or injure the business of another bearing the same name, provided he does not resort to any artifice or contrivance for the purpose of producing the impression that the establishments are identical, or do anything calculated to mislead." In Fullwood v. Fullwood, 9 Ch. Div. 176, R. J. Fullwood carried on business as manufacturer of annatto at 24 Somerset place, Hexton, from 1785 to 1832. Plaintiff and three brothers, one of whom was the defendant, succeeded to the business, but ultimately the right to carry on the business vested in the plaintiff. Defendant, Mathew Fullwood, and another brother formed a copartnership in the name of E. Fullwood & Co., and issued and distributed in various ways cards containing the following: "Established over 85 years. E. Fullwood & Co. (late of Somerset Place, Hexton), Original Manufacturers of Liquid and Cake Annatto." They also placed around the bottles containing the annatto a wrapper resembling that which plaintiff used. The court say: "Defendants are entitled to carry on their business under the firm name which they have adopted, if they are so minded, provided they do not represent themselves to be carrying on the business which has descended to plaintiff." In Bininger v. Clark, 60 Barb. (N. Y.) 113, the defendant wrongfully advertised himself as successor to the old firm, and made such a use of his own name as to indicate a fraudulent intent. Hegeman & Co. v. Hegeman, 8 Daly (N. Y.) 1; Levy v. Walker, 10 Ch. Div. 436. In Churton v. Douglas, Johns. Eng. Ch. 174, 5 Jur. (N. S.) 887, plaintiff and defendant had carried on the business as stuff manufacturers at Bradford, in a building owned by defendant, and known as "Hall Ings," under the name and style of John Douglas & Co. Defendant sold out to plaintiff all his share, right, and title in the business, including the good will, and executed to plaintiff a seven-year lease of the premises occupied by the firm. Within a short period defendant set up in the same line of business, next door to plaintiff, in a part of the same building known as "Hall Ings," adopting the old firm name of John Douglas & Co. The court held that defendant, by the use of the old firm name, and the surroundings, would be obtaining the custom of the old firm, by inducing the belief that his was a continuation of the old establishment. The court says: "The authorities, I think, are conclusive upon this point that the mere expression of parting with or selling the good will does not imply a contract on the part of the person parting with that good

will not to set up again in the similar business; but I use the expression 'similar' to avoid including the case of the vendor seeking to carry on the identical business. He does not contract that he will not carry on an exactly similar business, with all the advantage which he might acquire from his industry and labor, and from the regard people may have of him, and that in a place next door, if you like, to the very place where the former business was carried on. It is settled that it is the fault of those who wish any protection against such a class that they do not take care to insert the provision to that effect in the deed."

The same principle obtains with reference to trade-marks. One may have a right in his own name as a trade-mark, but he cannot have such a right as against another person of the same name, unless the defendant use a form of stamp or label so like that used by the plaintiff as to represent that the defendant's goods are of the plaintiff's manufacture. Sykes v. Sykes, 3 Barn. & C. 541; Holloway v. Holloway, 13 Beav. 209; Rogers v. Taintor, 97 Mass. 291; Gilman v. Hunnewell, 122 Mass. 139; Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535. The tests applied by all the authorities in this class of cases are: Is a corporate or trade or fictitious name simulated? Is the name assumed or adopted false in fact? Is it used in connection with locality or other representations, so as to convey the impression that the business is a continuation of the old business? Defendants are not responsible for the blunders made by clerks, postal clerks, mail carriers, telephone employés or newspaper reporters. In Meneely v. Meneely, the court say: "When the only confusion created is that which results from the similarity of names, the court will not interfere." In Turton v. Turton it is said that "defendants are not responsible for the blunders made by the business community in not distinguishing between John Turton & Sons and Thomas Turton & Sons." See, also, Richardson & Boynton Co. v. Richardson & Morgan Co., 55 Hun, 606, 8 N. Y. Supp. 52; Goodyear India Rubber Glove Mfg. Co. v. Goodyear Rubber Co., 128 U. S. 598, 9 Sup. Ct. 166, 32 L. Ed. 535.

Any collocation of the names of Farrand and Williams would create some confusion. Defendant Clark had been connected with the old business for 30 years, and Williams, the son-in-law of Mr. Farrand, for 21 years. Defendants are using their own names only. They went into business on Woodward avenue, several blocks from the old stand. In every letter head, bill head, card, or advertisement in which their firm name appears they give the individual names of the members of the firm, the new place of business, and in no case have they represented that they are successors to the old firm. The bill heads used by the old firm had a cut of the old stand on the left-hand upper corner, about three inches square. Those of the new firm contain no cut, and less than half of the amount of matter. It would be exceedingly difficult to prepare two bill heads more unlike. The letter heads

of the old firm contained two cuts—one of the old stand, at the left hand, and one of the Peninsular White Lead & Color Works, on the right. The dissimilarity is marked. The envelopes used by the old firm contain eight printed lines on the upper left-hand corner, occupying an inch and three-quarters of space. Those used by the new firm contain five lines, occupying about three-quarters of an inch in space. There has been no attempt at imitation, in words or type. On March 15th they announced, through circulars distributed generally, that they had engaged in business at 32 and 34 Woodward avenue; that they expected to have their new store ready for occupancy in a few days; and that the work of getting a new stock of goods would be pushed as fast as possible. On April 7th they issued another circular, announcing that they were now prepared to fill orders, and hoping that the friendly acquaintance of many years would be continued. An advertisement is produced, wherein defendants say: "Though it may seem paradoxical, it is nevertheless true, that the wholesale drug-house of Farrand, Williams & Clark is both the oldest and the newest representative of this important commercial industry in Detroit." But in the same advertisement they announce the dissolution of the old firm, their retirement from said firm, and the formation and business location of the new firm. It is difficult to imagine how such an advertisement would mislead the public. It contains no false colors. Both parties advertised extensively in the city and state papers and in the trade journals; complainants giving the names of their individual members, and their new firm name, and advertising themselves as the successors to Farrand, Williams & Co.; and defendants giving the names of their individual members, and the name and business location of the new firm. Complainants sent out circulars to the trade generally, informing it of the dissolution of the old firm, the fact that they were the successors, and giving their firm name; and defendants sent out circulars announcing their withdrawal and the formation of a new firm. There is no doubt but that the dissolution of this firm, the fact that complainants had bought out the interests of defendants, the name adopted by complainants, the formation of the new firm, the names of its members, and the defendants' firm name, have been most extensively advertised by both parties, not only in the city, but throughout the state and Union. Nearly 50 letters have been received by the old firm, since the dissolution, addressed to Farrand & Williams; Farrand & Williams Paint Co.; Farrand & Williams Drug Co.; Farrand, Sheley & Brooks; Farrand, Williams & Sheley; Farrand, Williams, Sheley & Co.; Farrand, Williams & Brooks; Farrand & Co.; Williams, Farrand & Co.; Farrand, Sheley & Brooks; Williams & Farrand; Williams, Farrand & Co.; and Williams & Co. It cannot be said that any act of defendants is responsible for these blunders. Confusion is inseparable from the dissolution of an old firm and the composition of two firms from its membership, especially when the name of but one of those who remain has

appeared in the firm name, and the new firm is composed of one whose name for nearly half a century has stood at the head of the firm name, and the surname of another retiring member is the same as the only other name used in the old firm name. It appears that at the outset defendant Clark by mistake opened two or three letters addressed "Farrand, Williams & Co.," but in every other instance defendants refused to receive mail directed to Farrand, Williams & Co., unless directed to defendants' street and number; that in a single instance Clark inadvertently signed a letter "Farrand, Williams & Co."; that two checks were sent to defendants in payment for goods bought from them, which were payable to the order of Farrand, Williams & Co., and Mr. Farrand indorsed them Farrand, Williams & Co., and guarantied the indorsements; that in four instances merchandise or articles not marked, but intended for defendants, were delivered to complainants, and afterwards taken away; that in two instances complainants were notified by freight agents that freight awaited delivery; that in both the goods were manifested to Farrand, Williams & Co., but marked, and were afterwards delivered, to Farrand, Williams & Clark, for whom they were intended; that complainants were notified that a sample box of glassware had been shipped to them, but they had not received it; that defendants received a sample box of glassware from the same house, which was billed to Farrand, Williams & Clark, and the latter were notified of the shipment by the assignors; that similar boxes of samples had been sent to other drughouses at Detroit; that in one or two instances merchandise had been delivered to defendants which was intended for complainants; that in a single instance a customer at Port Huron, who knew of the dissolution, intending to call up the old house by telephone, asked for Farrand & Williams, was given Farrand, Williams & Clark, and told that it was Farrand, Williams & Clark, asked the price of oil, and ordered one barrel; that 112 letters, telegrams, receipts, or bills were received by complainants directed to Farrand, Williams & Co., which were intended for defendants; that of these 35 were directed on the inside to Farrand, Williams & Clark; that all of the letters so received were from business houses from which defendants were buying goods, and none were from customers of either house. These proofs do not tend to show any appropriation by defendants of the old firm name, or any attempt to secure the correspondence addressed to the old firm, or that the customers have been deceived or misled, or that defendants have practiced any fraud, concealment, or deception. * * *

The decree of the court below must be affirmed as of February 27, 1891, and the bill dismissed, with costs to defendants.

MORSE and GRANT, JJ., concurred with McGRATH, J. LONG, J., did not sit.[1]

[1] The dissenting opinion of Champlin, C. J., is omitted.

SECTION 4.—TITLE TO PARTNERSHIP PROPERTY: HOW TAKEN AND HELD.

HENDREN et al. v. WING et al.

(Supreme Court of Arkansas, 1895. 60 Ark. 561, 31 S. W. 149, 46 Am. St. Rep. 218.)

Replevin by D. R. Wing and others, partners as the Arkansas Machine & Supply Company, against G. H. Hendren and others. Judgment for plaintiffs. Defendants appeal.

The appellees, D. R. Wing, C. E. Stephens, and Joseph Eggleston, are partners doing business under the firm name of Arkansas Machinery & Supply Company. In the course of their business as such firm they sold one E. H. Miller the following machinery: One 35 horse power return tubular boiler, with fixtures and fittings; and one 35 horse power C. & T. engine complete, with fixtures and connections. For this property Miller agreed to pay $906.50, and he gave his notes for that amount, payable in installments. Afterwards, to further secure the payment of these notes, Miller executed a mortgage to said Arkansas Machinery & Supply Company, including in said mortgage the machinery purchased and also other property. Miller at this time was also indebted to appellants, and to secure the same had previously given them a mortgage on another boiler and engine. He disposed of this machinery without appellants' consent, and replaced it with the machinery in controversy. Appellants obtained possession of the boiler and engine purchased from appellees and claim the right to hold same in lieu of the boiler and engine wrongfully disposed of by Miller. Appellees brought replevin to recover the same. Their action was resisted on the ground that the mortgage to the Arkansas Machinery & Supply Company, under which appellees claimed, did not contain the name of either a natural or artificial person, and was therefore void. The circuit court held that the mortgage was valid, and gave judgment in favor of appellees.

RIDDICK, J. The Arkansas Machinery & Supply Company is not a corporation, but it is a business name of a firm of partners. The question for us to determine is whether a chattel mortgage executed to it as such partnership is valid at law. It was said by Mr. Justice Eakin, in Percifull v. Platt, 36 Ark. 464, that "a partnership as such cannot at law be the grantee in a deed or hold real estate." "The legal title," said he, "must vest in some person, and a partnership is not a corporation. If the title be made to all the partners by name, they hold the legal title as tenants in common. * * * If the deed be to a name adopted as the firm style, which includes the name of no party, it passes nothing at law." He proceeds, then, to say that in

equity the rule is different. A deed or mortgage of real estate to partners, describing them only by their firm name, will be enforced in equity, whether such firm name includes the name of one or more of the partners or not. Chicago Lumber Co. v. Ashworth, 26 Kan. 212; Bates, Partn. § 296, and authorities there collated. But, as this is an action at law, it is contended that the strict rule of law with reference to the conveyance of real estate to partnerships must apply. The decisions in regard to transfers of real estate to partnerships are based on the old rule stated by Judge Eakin, that "a partnership, as such, cannot at law be the grantee in a deed or hold real estate." This rule does not apply to personal property. On the contrary, a partnership, as such, can at law be the vendee in a bill of sale or other conveyance of personal property. The custom of the country teaches us that this is so. The business of the country is largely carried on by partners under partnership names which frequently do not contain the name of any person. Vast quantities of personal property of all kinds are contracted for, bought, and sold by such firms under their firm names each year, and their right to thus buy and sell goes unchallenged. A consideration of this fact shows that there is a wide distinction between the rights of partnerships at law in regard to the buying and selling of personal property and the restrictions which prevail therein in regard to transfers of real estate. A mortgage is only a conveyance for the purpose of securing a debt. If a bill of sale conveying personal property to a partnership by its firm name is valid, we see no reason why a mortgage of personal property to a partnership should not be upheld under like circumstances. It is true that the statute requires certain formalities in regard to acknowledging and recording mortgages in order to give notice to third parties. But there is nothing in the statute which renders invalid mortgages of personal property executed to a partnership by its firm name. Such a conveyance to a firm is just as effectual as if the name of each partner had been set out in the mortgage. Henderson v. Gates, 52 Ark. 373, 12 S. W. 780; Kellogg v. Olson, 34 Minn. 103, 24 N. W. 364; Byam v. Bickford, 140 Mass. 32, 2 N. E. 687; Brunson v. Morgan, 76 Ala. 593; Chicago Lumber Co. v. Ashworth, 26 Kan. 212. We therefore conclude that the judgment of the circuit court in regard to the validity of the mortgage was correct, and it is affirmed.

GILLE v. HUNT et al.

(Supreme Court of Minnesota, 1886. 35 Minn. 357, 29 N. W. 2.)

GILFILLAN, C. J. Action under the statute to determine adverse claims to real estate, each party claiming the title. July 25, 1856, Jared S. Demman owned the premises, and on that day executed a mortgage thereon to "D. B. Dorman & Co.," containing the usual power of sale, and which was, on the same day, duly recorded. October 7, 1856,

Demman conveyed the premises to Peter Poncin, by deed duly recorded the next day. On the same day, evidently either at the same time of or after the execution of this last deed, D. B. Dorman executed to Poncin a deed of quitclaim and release of the premises, which was recorded October 8, 1856. Plaintiff claims under Poncin. "D. B. Dorman & Co." was a partnership under that name, composed of D. B. Dorman and Ovid Pinney, though that fact does not appear to have been stated in the mortgage. April 15, 1857, Dorman executed to Pinney an assignment of the mortgage recorded September 13, 1859. In May, 1864, Pinney proceeded to foreclose the mortgage under the power of sale, signing his name to the notice of sale, "Ovid Pinney, Mortgagee and Assignee." At the sale he became the purchaser, and received from the sheriff the usual certificate. The defendants claim under the mortgage and foreclosure.

The case turns mainly on the question, in whom was the legal title to the mortgage; that is, who was in law the mortgagee? Was it D. B. Dorman, or was it the partnership or the parties doing business under the name D. B. Dorman & Co.? A mortgage of real estate, though it is in effect but a lien or security, is in form a conveyance of an estate or interest in land (Morrison v. Mendenhall, 18 Minn. 232 [Gil. 212]), and must be governed by the same rules as to its execution and validity, and the capacity of the parties, and their proper designation, as are applied to a conveyance. It has been affirmed in several cases in this court that the legal title to real estate can be held only by a person, or a corporate entity, which is deemed such in law; and that, therefore, a partnership cannot, as such, take and hold such legal title. Thus, in German Land Ass'n v. Scholler, 10 Minn. 331 (Gil. 260), it was decided that the plaintiff, being only a voluntary association of persons, unincorporated, had no legal capacity to take or hold real property. The rule was recognized in Morrison v. Mendenhall; and in Tidd v. Rines, 26 Minn. 201, 2 N. W. 497, it was decided that a conveyance to a partnership by its first name did not vest in it any legal title or estate, because a partnership, as such, is not recognized in law as a person; so that even had it been stated in the mortgage that the name inserted as the mortgagee was that of a partnership, it would not have made the partnership mortgagee. Nor, as we think, would the individual partners (other than the one named) be the mortgagee.

It is true that the grantee in a conveyance need not be named, provided he be described with sufficient definiteness and certainty, as where he is indicated by a title, or an office, and there is but one such; as in Lady Superior v. McNamara, 3 Barb. Ch. (N. Y.) 375, 49 Am. Dec. 184, where a conveyance to the "Lady Superior" of a designated convent was held good to vest the title in a person then lady superior; but the court referred with approval to Duncan v. Beard, 2 Nott & McC. (S. C.) 400, in which it was held that a conveyance to one and his "associates" vested title in none but the person named, the term

"associates" being too indefinite to carry the title to the persons intended by it. There are some authorities which seem to hold that such a conveyance would be good to the persons so designated, and that it may be proved by parol who they are; but we think these cases go a great way towards holding that a conveyance of real estate may vest partly in parol, and when we consider the infinite confusion in titles to real estate—in which there ought to be great definiteness and certainty—such a rule might let in, we do not hesitate to decide that the proposition that such a designation is too indefinite and uncertain rests in better reason and authority. Where the style of a partnership is inserted as a grantee, and it contains the name or names of one or more of the partners, there is no reason why the title should not vest in the partners so named; and the authorities are to the effect that it would.

The legal title to the mortgage in question was, then, in D. B. Dorman. He was the only person through whom legal title could be made, under the mortgage. * * *

Judgment affirmed.[1]

[1] In Kringle v. Rhomberg et al., 120 Iowa, 472, 94 N. W. 1115 (1903), it is held that, "where title to real property purchased in a partnership transaction is taken in the name of one of the partners, there is a resulting trust in favor of the partnership, which may be established by parol evidence, so that the title in the one partner may be charged with the interest of the partnership."

In Barber v. Crowell et al., 55 Neb. 571, 75 N. W. 1109 (1898), in deciding, what effect should be given to a mortgage executed to the "Western Trust & Security Company," the court said: "On the assumption that the mortgagee was a partnership or unincorporated association, it is contended that it could not take title to real estate, and that the mortgage is therefore a nullity. It is undoubtedly true that a conveyance of land will be ineffectual to pass the legal title, unless made to a grantee having capacity to receive it; and it is also true that a partnership possesses no such capacity. But a mortgage is not a conveyance. It is a mere security in the form of a conditional conveyance, and the interest which it vests in the mortgagee is not essentially different from that created by a mechanic's lien or an ordinary judgment. Davidson v. Cox, 11 Neb. 250, 9 N. W. 95; Buchanan v. Griggs, 18 Neb. 121, 24 N. W. 452. In the former case it was said: 'In this state, a mortgage of real estate is a mere pledge or collateral security creating a lien upon the mortgaged property, but conveying no title nor vesting any estate, either before or after condition broken.' That a lien on real estate to secure an indebtedness may accrue to a partnership in its firm name has been decided in Foster v. Johnson, 39 Minn. 380, 40 N. W. 255, and in Chicago Lumber Co. v. Ashworth, 26 Kan. 212."

SECTION 5.—CONVERSION OF FIRM REALTY INTO PERSONALTY.

DARBY v. DARBY et al.

(High Court of Chancery, 1856. 3 Drew. 495.)

Alfred Darby and Abraham Darby embarked in a joint speculation as partners in the purchase of real estate, to be laid out in building sites and resold for their joint profit. There was no actual deed or written instrument of partnership. While the arrangement continued, and while a large portion of the land thus bought remained unsold, Alfred Darby died.

This was a bill filed by his administratrix for the administration of his estate. The principal question was whether Alfred Darby's share of the unrealized real estate descended to his heir at law, or whether it passed as personal estate to his personal representative.

Sir R. T. KINDERSLEY, V. C. [after reviewing the English cases.] The result, then, of the authorities may be thus stated: Lord Thurlow was of opinion that a special contract was necessary to convert the land into personalty; and Sir W. Grant followed that decision. Lord Eldon on more than one occasion strongly expressed his opinion that Lord Thurlow's decision was wrong. Sir J. Leach clearly decided in three cases that there was conversion out and out; and Sir L. Shadwell, in the last case before him, clearly decided in the same way. That is the state of the authorities.

Now it appears to me that, irrespective of authority, and looking at the matter with reference to principles well established in this court, if partners purchase land merely for the purpose of their trade, and pay for it out of the partnership property, that transaction makes the property personalty, and effects a conversion out and out.

What is the clear principle of this court as to the law of partnership? It is that on the dissolution of the partnership all the property belonging to the partnership shall be sold, and the proceeds of the sale, after discharging all the partnership debts and liabilities, shall be divided among the partners according to their respective shares in the capital. That is the general rule. It requires no special stipulation. It is inherent in the very contract of partnership. That the rule applies to all ordinary partnership property is beyond all question, and no one partner has a right to insist that any particular part or item of the partnership property shall remain unsold, and that he shall retain his own share of it in specie. This principle is clearly laid down by Lord Eldon in Crawshay v. Collins, 15 Ves. 218, and by Sir W. Grant, in Featherstonhaugh v. Fenwick, 17 Ves. 298, and the right of each partner to insist on a sale of all the partnership property, which arises from

what is implied in the contract of partnership, is just as stringent as a special contract would be. If, then, this rule applies to ordinary stock in trade, why should it not apply to all kinds of partnership property? Suppose that partners, for the purpose of carrying on their business, purchase out of the funds of the partnership leasehold estate, or take a lease of land, paying the rent out of the partnership funds; can it be doubted that the same rule which applies to ordinary chattels would apply to such leasehold property? I do not think it was ever questioned that, on a dissolution, the right of each partner to have the partnership effects sold applies to leasehold property belonging to the partnership as much as to any other stock in trade. No one partner can insist on retaining his share unsold. Nor would it make any difference in whom the legal estate was vested, whether in one of the partners or in all. This court would regulate the matter according to the equities. And Sir W. Grant so decided in Featherstonhaugh v. Fenwick.

If, then, the rule applies, not only to ordinary stock in trade, but also to a lease for years, suppose, next, that the partnership, instead of purchasing a term of years, were (whether from necessity or choice) to purchase land in fee; if the land is necessary for the partnership business, and bought with the partnership assets, what difference can it make whether the real estate bought is leasehold or in fee? Let it be once established that the property purchased is partnership property and it then comes under the operation of those principles which arise out of the partnership contract; and there seems to be no reason why the operation of those principles is to be restricted to any particular class or species of partnership property. The observations of Lord Eldon in Crawshay v. Maule [1 Swanst. 495], show that in his opinion the right to a sale on a dissolution of partnership does not in any degree depend on the nature of the property. Nor could it be material in this case, any more than on the purchase of a leasehold interest, in whom the legal estate was vested.

I should, therefore, feel no hesitation in coming to this conclusion: That the mere contract of partnership, without any express stipulation, involves in it an implied contract, quite as stringent as if it were expressed, that at the dissolution of the partnership all the property then belonging to the partnership, whether it be ordinary stock in trade, or a leasehold interest, or a fee-simple estate in land, shall be sold, and the net proceeds, after satisfying all the partnership debts and liabilities, be divided among the partners, and that each partner, and the representatives of any deceased partner, have a right to insist on this being done.

Next, what is the doctrine of this court as to conversion? If a testator seised of real estate devises it for sale, and directs that the proceeds of the sale shall be divided among certain persons, so that each of the cestuis que trustent is entitled to say he will have it sold and will take his share of the proceeds, that real estate is in equity

converted into personalty; and so, if three persons contract that certain real property belonging to them shall be sold, and the proceeds be divided among them, so that each one of them has a right to insist that it shall be sold, and that he shall have his share of the proceeds as money, that real property is in equity converted into personalty, and if any one of them dies while the property remains unsold his share is personalty, as between his heir and his personal representatives.

Now, if it be established that by the contract of partnership all the partnership property is to be sold at the dissolution of the partnership, then any real property which has become the property of the partnership becomes, by force of the partnership contract, converted into personalty; and that, not merely as between the partners, to the extent of discharging the partnership debts, but as between the real and personal representatives of any deceased partner.

That this is so I should, in the absence of all authority, have decided upon the principle; and when I find, notwithstanding the decision of Lord Thurlow, followed by Sir W. Grant, that Lord Eldon was clearly of opinion that real property purchased by a partnership for the partnership purposes and with the partnership funds becomes personalty, that Sir J. Leach repeatedly so decided without any doubt, and that Sir L. Shadwell also decided the last case in the same way, I can have no difficulty in coming to the conclusion that, whenever a partnership purchase real estate for the partnership purposes and with the partnership funds, it is, as between the real and personal representatives of the partners, personal estate.

Now, this case is not the ordinary case where persons carrying on the ordinary business of a commercial or manufacturing partnership have found it necessary to purchase real estate for partnership purposes. That is not the case. Here they bought land as the stock in trade, by the sale of which they were to make their profits. The land was not in the nature of plant, but was the very subject-matter of their trade. Does that make any difference? If it does, I think it is in favor of treating it as converted, because the real estate is here clearly put in the same position as ordinary stock in trade; and it appears to me that, if I entertained more doubt than I do on the general question, that doubt would in this case be very much diminished by the circumstance that here the real estate is itself bought for the very purpose of selling it again. The very intention of the partnership was to buy land to resell it. That is their very contract, and without selling the land again there would be no partnership business. The partnership was for the purpose of buying land to parcel it out in plots, and to sell them again, and each partner had a right to say he would have that contract carried out. We have here what Lord Thurlow wanted in Thornton v. Dixon, an actual contract that the land shall be sold.

I must, therefore, decide that the share of A. Darby was personal estate, and passed to his personal representatives.

DYER v. CLARK et al.

(Supreme Judicial Court of Massachusetts, 1843. 5 Metc. 562. 39 Am. Dec. 697.)

Bill in equity. The plaintiff is surviving partner of the firm of Burleigh & Dyer, and the defendants are the administrator, the widow, and the minor children of the deceased partner, Stevens Burleigh. The case was heard on the bill, the answer, and a master's report.

SHAW, C. J. This is a suit in equity by the surviving partner of the firm of Burleigh & Dyer, established by articles of copartnership under seal, for the purpose of carrying on the business of distillers. The principal question is one which has arisen in several other cases, and is this: Whether real estate, purchased by copartners from partnership funds, to be held, used, and occupied for partnership purposes, is to be deemed in all respects real estate in this commonwealth, to vest in the partners severally as tenants in common, so that, on the decease of either, his share will descend to his heirs, be chargeable with his wife's dower, and in all respects held and treated as real estate, held by the deceased partner as a tenant in common; or whether it shall be regarded as quasi personal property, so as to be held and appropriated as personal property, first, to the liquidation and discharge of the partnership debts, and to the adjustment of the partnership account, and payment of the amount due, if any, to the surviving partner, before it shall go to the widow and heirs of the deceased partner. This is a new question here, and comes now to be decided for the first time.

There are some principles, bearing upon the result, which seem to be well settled, and may tend to establish the grounds of equity and law upon which the decision must be made. It is considered as established law that partnership property must first be applied to the payment of partnership debts, and therefore that an attachment of partnership property for a partnership debt, though subsequent in time, will take precedence of a prior attachment of the same property for the debt of one of the partners. It is also considered that, however extensive the partnership may be, though the partners may hold a large amount and great variety of property, and owe many debts, the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts and a just settlement of the account between himself and his partner or partners. 1 Ves. Sr. 242.

The time of the dissolution of a partnership fixes the time at which the account is to be taken, in order to ascertain the relative rights of the partners and their respective shares in the joint fund. The debts may be numerous, and the funds widely dispersed and difficult of collection; and therefore much time may elapse before the affairs can be wound up, the debts paid, and the surplus put in a condi-

tion to be divided. But, whatever time may elapse before the final settlement can be practically made, that settlement, when made, must relate back to the time when the partnership was dissolved, to determine the relative interests of the partners in the fund.

When, therefore, one of the partners dies, which is de facto a dissolution of the partnership, it seems to be the dictate of natural equity that the separate creditors of the deceased partner, the widow, heirs, legatees, and all others claiming a derivative title to the property of the deceased and standing on his rights, should take exactly the same measure of justice as such partner himself would have taken, had the partnership been dissolved in his lifetime; and such interest would be the net balance of the account, as above stated.

Such, indeed, is the result of the application of the well-known rules of law, when the partnership stock and property consist of personal estate only; and, as partnerships were formed mainly for the promotion of mercantile transactions, the stock commonly consisted of cash, merchandise, securities, and other personal property, and therefore the rules of law governing that relation would naturally be framed with more especial reference to that species of property. It is therefore held that on the decease of one of the partners, as the surviving partner stands chargeable with the whole of the partnership debts, the interest of the partners in the chattels and choses in action shall be deemed so far a joint tenancy as to enable the surviving partner to take the property by survivorship, for all purposes of holding and administering the estate, until the effects are reduced to money and the debts paid, though, for the purpose of encouraging trade, it is held that the harsh doctrine of the jus accrescendi, which is an incident of joint tenancy at the common law, as well in real as in personal estate, shall not apply to such partnership property; but, on the contrary, when the debts are all paid, the effects of the partnership reduced to money, and the purposes of the partnership accomplished, the surviving partner shall be held to account with the representatives of the deceased for his just share of the partnership funds.

Then the question is whether there is anything so peculiar in the nature and characteristics of real estate as to prevent these broad principles of equity from applying to it. So long as real estate is governed by the strict rules of the common law, there would be, certainly, great difficulty in shaping the tenure of the legal estate in such form as to accomplish these objects. Should the partners take their conveyance in such mode as to create a joint tenancy, as they still may, though contrary to the policy of our law, still it would not accomplish the purposes of the parties, first, because either joint tenant might, at his option, break the joint tenancy and defeat the right of survivorship by an alienation of his estate, or (what would be still more objectionable) the right of survivorship at the common law would give the whole estate to the survivor, without liability to account, and thus wholly de-

feat the claims of the separate creditors, and of the widow and heirs of the deceased partner.

But we are of opinion that the object may be accomplished in equity, so as to secure all parties in their just rights, by considering the legal estate as held in trust for the purpose of the partnership; and, since this court has been fully empowered to take cognizance of all implied as well as express trusts and carry them into effect, there is no difficulty, but, on the contrary, great fitness, in adopting the rules of equity on the subject which have been adopted for the like purpose in England and in some of our sister states. And it appears to us that, considering the nature of a partnership and the mutual confidence in each other which that relation implies, it is not putting a forced construction upon their act and intent to hold that, when property is purchased in the name of the partners out of partnership funds and for partnership use, though by force of the common law they take the legal estate as tenants in common, yet that each is under a conscientious obligation to hold that legal estate until the purposes for which it was so purchased are accomplished, and to appropriate it to those purposes, by first applying it to the payment of the partnership debts, for which both his partner and he himself are liable, and until he has come to a just account with his partner. Each has an equitable interest in that portion of the legal estate held by the other until the debts obligatory on both are paid and his own share of the outlay for partnership stock is restored to him. This mutual equity of the parties is greatly strengthened by the consideration that partners may have contributed to the capital stock in unequal proportions, or, indeed, that one may have advanced the whole. Take the case of a capitalist, who is willing to put in money, but wishes to take no active concern in the conduct of business, and a man who has skill, capacity, integrity, and industry to make him a most useful active partner, but without property, and they form a partnership. Suppose real estate, necessary to the carrying on of the business of the partnership, should be purchased out of the capital stock and on partnership account, and a deed taken to them as partners, without any special provisions. Credit is obtained for the firm, as well on the real estate as the other property of the firm. What are the true equitable rights of the partners, as resulting from their presumed intentions, in such real estate? Is not the share of each to stand pledged to the other, and has not each an equitable lien on the estate, requiring that it shall be held and appropriated, first to pay the joint debt, then to repay the partner who advanced the capital, before it shall be applied to the separate use of either of the partners? The creditors have an interest, indirectly, in the same appropriation, not because they have any lien, legal or equitable (2 Story on Eq. § 1253), upon the property itself, but on the equitable principle which determines that the real estate so held shall be deemed to constitute part of the fund from which their debts are to be paid before it can legally or honestly be diverted to the private use of the

partners. Suppose this trust is not implied; what would be the condition of the parties, in the case supposed, in the various contingencies which might happen? Suppose the elder and wealthy partner were to die. The legal estate descends to his heirs, clothed with no trust in favor of the surviving partner. The latter, without property of his own, and relying on the joint fund, which, if made liable, is sufficient for the purpose, is left to pay the whole of the debt, whilst a portion, and perhaps a large portion, of the fund bound for its payment is withdrawn. Or suppose the younger partner were to die, and his share of the legal estate should go to his creditors, wife, or children, and be withdrawn from the partnership fund; it would work manifest injustice to him who had furnished the fund from which it was purchased. But treating it as a trust, the rights of all parties will be preserved. The legal estate will go to those entitled to it, subject only to a trust and equitable lien to the surviving partner, by which so much of it shall stand charged as may be necessary to accomplish the purposes for which they purchased it. To this extent, and no further, will it be bound; and subject to this all those will take who are entitled to the property, namely, the creditors, widow, heirs, and all others standing on the rights of the deceased partner. * * *

On the facts of the present case, we are of opinion that the real estate in question was a part of the capital stock, purchased out of the partnership funds, for the partnership use, and for the account of the firm.

The plaintiff has received a sum in rents and profits that have accrued since his partner's death. The defendant Clark, as administrator of Burleigh, the deceased partner, has sold an undivided half of the property as his, under a license, and with the assent of the plaintiff. The widow joined to release her dower, for a nominal sum. But we cannot perceive that the right of the widow is distinguishable from that of the creditors and heirs of the deceased partner. As far as this estate was held in trust by her deceased husband, she was not entitled to dower. For all beyond that she will be entitled, because he held it as legal estate, unless she is barred by her release, of which we give no opinion.

The plaintiff is entitled to a decree charging the amount of rents and profits in his hands, and so much of the proceeds of the sale made by the administrator, as will be sufficient to discharge the balance of the partnership account; and the rest of the proceeds will remain in the hands of Clark, the administrator of Burleigh, to be distributed according to law.[1]

[1] Hubbard et al. v. Winsor et al., 15 Mich. 147 (1866). Campbell, J.: "Bill to restrain the collection of certain taxes. * * * The grounds set up for relief are that real estate belonging to the complainants was assessed to the partnership. * * * We think the objections concerning the mode of assessing real estate are not tenable. It appears that the land was all handed in on one list with other property belonging to the firm, and, as it is alleged in the bill to be held in joint tenancy, there could be no assessment of shares

HUSTON et al. v. NEIL.

(Supreme Court of Indiana, 1873. 41 Ind. 504.)

BUSKIRK, J. This was an action by the appellee against the appellants to obtain a partition of certain real estate. The complaint alleges that the plaintiff was a tenant in common with the defendants in lot 51 of Conner's first plat in the original plat of the town of Connersville, Fayette county, Ind.; that on the 27th day of April, 1855, one Joshua Bates and one Edward Neil purchased said real estate from the Junction Railroad Company, which company, by proper deed, conveyed said property to Bates & Neil; that at the time said conveyance was made to said Bates & Neil she was the lawful wife of the said Edward Neil, and continued to be such until the 4th day of January, 1870, when the said Neil departed this life intestate; that on the 30th day of April, 1855, the said Bates and Neil, by a mortgage duly and lawfully executed, mortgaged said lot to the defendants; that on the 17th day of March, 1859, the said mortgage was foreclosed, and said real estate was ordered to be sold; that in pursuance of said decree and order of sale the said property was on the 7th day of ———, 1859, sold, and was purchased by the said defendants, to whom a proper conveyance was made, and they are now the owners of the undivided five-sixths thereof; that she did not join with her husband in the execution of said mortgage; that she has not parted with her interest in said property; that as the widow of said Edward Neil, deceased, she is the owner of, and entitled to, the one undivided sixth of said real estate; and that the defendants are the owners of, and entitled to, the one undivided five-sixths. There was a prayer for partition and other proper relief.

There was issue, trial by the court, finding for the plaintiff, motion for a new trial made, overruled, and excepted to, and judgment on the finding.

The appellants have assigned for error the sustaining of a demurrer to the second paragraph of the answer and the overruling of the motion for a new trial.

The substance of the answer is that the property in controversy was purchased by partners, with partnership means, for partnership purposes, and that it was mortgaged to secure a partnership debt, and was sold on a foreclosure of such mortgage, and purchased by the partnership creditors, leaving a balance of their judgment unpaid; the firm and the members composing it being insolvent.

It is insisted by counsel for appellants that property thus acquired and held is regarded and treated as personal property and goes to pay the debts of the partnership, and only after they have been paid does it, or what is left of it, become the individual property of the partners,

in it individually to the owners severally, because their estate, as set out, is indivisible."

and that as it was applied to the payment of partnership debts, leaving a balance of such debts due and unpaid, the firm and individual members thereof being insolvent, the same was never held and owned by the said Bates & Neil as real estate, and that consequently no portion thereof descended to, or is owned by, the plaintiff by virtue of her marital rights.

There is an irreconcilable conflict between the English and American doctrine on this subject, and there is much conflict in the rule of decision adopted in the different states.

We find the law stated with great clearness and accuracy by Parsons in his work on Partnership. After speaking of the English doctrine, he says: "In this country the rule is otherwise. There is not, and we know no reason why there should be, any reluctance to recognize as partnership property any real estate which should be so considered; and when it has fulfilled all its functions as personal property, in respect of the partnership, the partners, and the creditors, and is no longer wanted for these, it may now become, in their hands who have the legal title, real estate, and subject to all incidents as such, because the same persons with us take the personalty and inherit the realty, and it will be much simpler and easier for them to take at once as realty that which is realty. The following, then, is the American rule: Real estate, purchased and held as partnership property, is so treated in equity, and subjected to all the incidents of partnership property. If there be death, the surviving partner, whether he hold the whole title, or hold it in part, or hold none of it, if he be a creditor of the partnership, has the same right against the real estate, and only the same, which any other creditor has. But real estate goes to pay the debts of the partnership, and only after they are paid does it, or what is left of it, become the property of the partners, or their representatives, free from all claims; and then it is divided between them just as so much money capital would be. But it then becomes at once real estate, or, rather, all the incidents and qualities of real estate revive. This rule goes upon the ground of a trust imposed upon all who hold the legal title, in behalf of all partnership objects; and, that trust once discharged, the residue resumes its former character."

The same author, in speaking of the right of dower in such real estate, says: "The English rule would seem to cut this off. But in this country it is quite well settled that while dower yields to the claims of partnership creditors, whether they are of the firm or strangers, and therefore cannot be granted until all the partnership debts are paid or secured, yet, when this is accomplished, as the land is treated in the same way as if it had never entered into partnership property, dower revives."

The previous rulings of this court are in harmony with the principle above enunciated. Matlock v. Matlock, 5 Ind. 403; Hale v. Plummer, 6 Ind. 121; Roberts v. McCarty, 9 Ind. 16, 68 Am. Dec. 604; Patterson v. Blake, 12 Ind. 436; Holland v. Fuller, 13 Ind. 195;

Dean v. Phillips, 17 Ind. 406; Schaeffer v. Fithian, 17 Ind. 463; Kistner v. Sindlinger, 33 Ind. 114.

It is also insisted by counsel for appellee that she was a proper and necessary party to the proceeding to foreclose said mortgage, and that, as she was not made a party, her rights cannot be and are not affected by such foreclosure and the sale made in pursuance thereof.

If the property in controversy was partnership property, then the interest of Neil was but the surplus remaining after the payment of the debts of the firm and the final accounting between the partners. If there was no surplus, Neil was never seised of the property, as real estate, at any time prior to his death, and consequently his wife had no interest in such property which would make her a necessary party to the suit to foreclose. Those only are necessary parties defendant who have or claim an interest in the controversy adverse to the plaintiff, or who are necessary parties to a complete determination or settlement of the questions involved. Section 18 of the Code; 2 Gav. & H. Rev. St. 1870, p. 46.

The case of Fletcher v. Holmes, 32 Ind. 497, is, upon the point under examination, much in point, and conclusively settles the question against the appellee.

In the quotation hereinbefore made from Parsons on Partnership the author speaks of dower. Our statute has abolished dower, and substituted in its place one-third in fee simple; but the same principles of law will apply to both alike.

We are very clearly of the opinion that the facts stated in the second paragraph of the answer constituted a complete defense to the action, and that the court erred in sustaining the demurrer thereto, for which error the judgment must be reversed.

The judgment is reversed, with costs; and the cause is remanded, with directions to the court below to overrule the demurrer to the second paragraph of the answer, and for further proceedings in accordance with this opinion.[1]

[1] In Walling et al. v. Burgess et al., 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481 (1889), after holding that a surviving partner can convey an equitable title to partnership realty to pay firm debts, without making the wife or representatives of the deceased partner parties to the deed, it is said: "Suppose, for instance, that, immediately before the death of Burgess, Burgess & Hildreth had sold and conveyed their real estate without the wife of Burgess joining, and the purchase money had been paid to the members of the firm and become a part of the partnership assets, it would seem clear that the widow and heirs could not have claimed and held any interest in the real estate so sold and conveyed. One of the purposes and objects of treating the partnership real estate as personal property in equity is that it may be sold and conveyed by the members of the firm in the usual course of business without the wives of the individual members joining in the conveyance. Were it otherwise, the business of the firm might be stopped, and the partners unable to realize on the assets of the firm, by reason of the wife of one of the members refusing to join in a conveyance of the real estate." But see Fairchild v. Fairchild, 64 N. Y. 471, and Pugh v. Currie, 5 Ala. 446.

DARROW et al. v. CALKINS et al.

(Court of Appeals of New York, 1897. 154 N. Y. 503, 49 N. E. 61, 48 L. R. A. 299, 61 Am. St. Rep. 637.)

Action by Alfred Lyman Darrow and Fanny Gay Darrow against Lyman Darrow Calkins and others. From an order of the Appellate Division (6 App. Div. 28, 39 N. Y. Supp. 527) vacating and setting aside an interlocutory judgment rendered in favor of plaintiffs, and granting a new trial, plaintiffs appeal.

The action was for partition of certain lands in the city of Brooklyn. The plaintiffs, as children and heirs at law of one Edwin J. Darrow, who died intestate November 13, 1864, claimed title to one undivided half of such land, subject to the dower right of two of the defendants, as set forth in the complaint. The defendants Calkins are the widow and three children of one Daniel O. Calkins, who died intestate July 20, 1887. It is alleged in the complaint that Edwin J. Darrow, at the time of his death, "was seised in fee simple" of the undivided one-half part of the premises sought to be partitioned, and Daniel O. Calkins of the other undivided one-half. It alleges that on the 25th day of September, 1861, the said Edwin J. Darrow, together with his wife, Lucy P. Darrow, made and executed "a certain deed in trust" bearing date on that day, which was recorded in the county of Kings January 19, 1865, whereby the said Edwin J. Darrow and his wife conveyed all their estate in the aforesaid real property to the said Daniel O. Calkins, "to have and to hold, to control and manage, sell and convey, the whole or any part of said premises as part of the partnership property of the aforesaid Calkins and Darrow, and to pay over to the said Darrow, his heirs and assigns, or other legal representatives, such portion thereof as shall, at the closing of the partnership business of said Calkins and Darrow, belong to or be due or coming to the said Darrow, his heirs, executors, assigns, or other legal representatives." It alleges, in substance, that a copartnership had existed up to the death of Darrow, in 1864, between him and Calkins, under the firm name of Calkins & Darrow; that the trust upon which the deed of September 25, 1861, was made had not been performed; that no accounting had been had to "these plaintiffs, or to any court having jurisdiction in the matter"; that the copartnership had long since ceased and terminated; that there were no outstanding debts of the firm; and that the purpose of the said trust had ceased to exist, and the trust, if ever operative, had terminated. The interests of the respective parties, as claimed by the plaintiffs, are set forth, in substance, that the plaintiffs are each entitled to an undivided fourth part of the premises, and the children of Calkins to the other one-half part, subject to dower interests as stated. The complaint further states that a "certain pretended" judgment was entered on the 31st day of October, 1867, in the Supreme Court of the state of New York, in

an action brought by Lucy P. Darrow (the widow of Edwin J. Darrow), as administratrix of his estate, against Daniel O. Calkins and others, for the purpose of ascertaining "what interest such administratrix had, if any, in the copartnership effects of the firm of Calkins & Darrow," by which judgment it was decreed that the plaintiffs (in this action) had no title or interest in the lands or real estate described in the complaint in that action, which included the premises sought to be partitioned in this action; that the present plaintiffs were infants, and nonresidents of the state, when the former action was brought; and that they were not legally brought in as parties to that action, and were not bound by the appearance of the guardian ad litem for them therein; and that the judgment as to them was without jurisdiction, and void. The complaint prayed judgment for partition according to the interests as set forth in the complaint.

The defendants Calkins answered the complaint, and, among other things, alleged that Daniel O. Calkins, at the time of his death, was the sole owner of the lands described in the complaint, and that prior to his death he had fully performed all the terms and conditions contained in the deed of September 25, 1861, and that upon his death the lands descended to his children and heirs at law, subject to the dower right of his widow. The defendants Calkins further set up the judgment rendered in the action brought by the administratrix of Edwin J. Darrow against Daniel O. Calkins in bar of the present action, and also the statute of limitations. [Here follows a statement of the evidence, and a résumé of the action begun in 1867.]

Thereafter on the 31st of October, the final decree was entered. By this decree it was, among other things, adjudged that the interest of Edwin J. Darrow in the lands and real estate and the proceeds thereof was personal estate, and belonged to the plaintiff, as administratrix; that the infant defendants (the present plaintiffs) had no title or interest therein as heirs of Edwin J. Darrow; that the assets of the copartnership of Calkins & Darrow, including contracts for the sale of real estate, were worth about $28,000; and that, the "plaintiff and defendant Daniel O. Calkins, on a full accounting between them as to said estate, having agreed upon the sum of $14,000 as the present actual value of the interest of the estate of the said Edwin J. Darrow in the said copartnership property," therefore, etc. The decree further provided that the said Calkins pay the plaintiff, as administratrix, said sum of $14,000, and that "thenceforward all the estate, rights, interests, property, and assets of the said firm shall belong to and be the property of the said Daniel O. Calkins as his own proper goods and chattels and credits, lands and tenements." Calkins paid the $14,000 as required by the judgment, and entered into possession of all the real estate embraced in the deed of September 25, 1861, not previously sold.

ANDREWS, C. J. We are relieved on this appeal from the inquiry which frequently arises between copartners and copartnership and in-

dividual creditors, whether real estate purchased and conveyed to the copartners during the existence of the firm by a conveyance which in form created a tenancy in common is to be regarded as belonging to them collectively as partnership property, or as the individual property of each according to the interests disclosed on the face of the deed. The finding of the trial court, which is not assailed by any exception, is express that the lands purchased by Daniel O. Calkins and Edwin J. Darrow were purchased by them as copartners out of the funds of the firm of Calkins & Darrow, and the deed executed by Darrow to Calkins on the 25th of September, 1861, upon which both the plaintiffs and the defendants rely as determining the character of the ownership, expressly declares in the habendum that the lands were partnership property of Calkins & Darrow. We are to assume, therefore, that the lands were originally purchased out of partnership funds, with the intention on the part of each partner that they should be held as partnership property, subject to administration under the rules governing the rights and interests of copartners in lands purchased by them to be held as the property of the partnership. The partners, as between themselves, made the lands partnership property, and the rights of creditors of the firm or of the individual partners are not involved. The only question here is between the plaintiffs, as heirs of Darrow, and the children of Calkins, and it turns mainly on the question whether, upon the death of Darrow, in 1864, an undivided half part of the lands to which he acquired the legal title by the deeds running jointly to himself and Calkins, executed between 1850 and 1854, descended to and vested in the plaintiffs as his heirs at law. The plaintiffs, at the death of Darrow, were infants; and, although this action was not commenced until 30 years after his death, nor until 15 years after the younger of the plaintiffs became of age, it seems, under the case of Howell v. Leavitt, 95 N. Y. 617, the plaintiffs, although they have slumbered upon their rights during an adverse possession 27 years, were not barred by the statute of limitations. So, also, we think it must be held that they were not barred by the adjudication in the decree of October 31, 1867, in the action brought by the administratrix Darrow against Calkins for the settlement of the partnership affairs, which declared that "they had no title or interest in the said lands and real estate as heirs of the said Edwin J. Darrow, deceased, or otherwise." The service of the summons on the infants by publication was not completed when the judgment was entered, and, until the period of publication had expired, the court could acquire no jurisdiction to appoint a guardian ad litem, or to render a judgment binding upon them as parties to the action. Brooklyn Trust Co. v. Bulmer, 49 N. Y. 84; Crouter v. Crouter, 133 N. Y. 55, 30 N. E. 726.

The legal nature and incidents of land purchased by a copartnership with copartnership funds is a subject upon which great diversity of opinion exists in different jurisdictions. The English rule, after many fluctuations, has, as we understand the cases, come to be that lands so

purchased, whether purchased for or used for partnership purposes or not, provided only that they were intended by the partners to constitute a part of the partnership property, become ipso facto, in the view of a court of equity, converted into personalty for all purposes, as well for the purpose of the adjustment of the partnership debts and the claims of the partners inter se as for the purpose of determining the succession as between the personal representatives of a deceased partner and the heir at law. Darby v. Darby, 3 Drew. 495; Essex v. Essex, 20 Beav. 442; Lindl. Partn. (3d Ed.) 681 et seq. This doctrine had its origin in England, and is said to have grown out of the peculiar law of inheritance there, and to remedy the hardship of the rule which excludes all but the eldest child from the inheritance, and of the other rule which exempts real estate in the hands of the heir from all but the specialty debts of the ancestor.[1] Fairchild v. Fairchild, 64 N. Y. 471; Shearer v. Shearer, 98 Mass. 114. Lindley, in his work on Partnership, bases the rule on the nature of the interest of each partner in the partnership property. He says (page 687): "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that in equity a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal, and not real, estate, unless, indeed, such conversion is inconsistent with the agreement between the parties." The concluding words of the paragraph quoted concede that the intention of the parties will prevent a conversion where that intention is manifested. The general doctrine of "out and out" conversion adopted by the English courts has not been followed to its full extent in this and many other American states. There is no policy growing out of our laws of inheritance or the exemption of lands from liability for simple contract debts, which requires the application of such a doctrine here. The lands of the ancestor are assets for the payment of all debts, and the persons who take by descent and under the statute of distribution are substantially the same. The necessity for an absolute conversion, supposed to be found in the nature of a partnership interest, seems hardly sufficient to justify a fiction which should deprive real estate of a partnership of its descendible quality, when it is admitted on all hands that partnership real estate, if the necessity arises, is first subject to be ap-

[1] A better statement of the reason for the doctrine is as follows: "From the principle that a share of a partner is nothing more than his proportion of the partnership assets after they have been turned into money and applied in liquidation of the partnership debts, it necessarily follows that, in equity, a share in a partnership, whether its property consists of land or not, must, as between the real and personal representatives of a deceased partner, be deemed to be personal, and not real, estate, unless, indeed, such conversion is inconsistent with the agreement between the parties." Lindley, Partn. *343.

propriated in equity to the discharge of partnership obligations and the adjustment of the equities between the parties.

The clear current of the American decisions supports the rule that, in the absence of any agreement, express or implied, between the partners to the contrary, partnership real estate retains its character as realty with all the incidents of that species of property between the partners themselves, and also between a surviving partner and the real and personal representatives of a deceased partner, except that each share is impressed with a trust implied by law in favor of the other partner that, so far as is necessary, it shall be first applied to the adjustment of partnership obligations and the payment of any balance found to be due from the one partner to the other on winding up the partnership affairs. To the extent necessary for these purposes the character of the property is, in equity, deemed to be changed into personalty. On the death of either partner, where the title is vested in both, the share of the land standing in the name of the deceased partner descends as real estate to his heirs, subject to the equity of the surviving partner to have it appropriated to accomplish the trust to which it was primarily subjected. The working out of the mutual rights which grew out of the partnership relation does not seem to require that the character of the property should be changed until the occasion arises for a conversion and then only to the extent required. The American rule commends itself for its simplicity. It makes the legal title subservient in equity to the original trust. It disturbs it no further than is necessary for this purpose. The portion of the land not required for partnership equities retains its character as realty, and it leaves the laws of inheritance and descent to their ordinary operation. It would be useless to review in detail the authorities which seem to us to maintain what has been called the "American Rule." We refer to a very few of them. Buchan v. Sumner, 2 Barb. Ch. (N. Y.) 167, 47 Am. Dec. 305; Collumb v. Read, 24 N. Y. 505; Fairchild v. Fairchild, supra; Shearer v. Shearer, supra; Shanks v. Klein, 104 U. S. 18, 26 L. Ed. 635. If, as sometimes happens, the title to partnership real estate is in the name of one of the partners only, on the death of the other partner his equitable title descends to his heirs or goes to his devisees, but subject to the primary claims growing out of the partnership relation. Fairchild v. Fairchild, supra; T. Pars. Partn. § 272. But the general principles to which we have adverted are those applied by courts of equity in determining the character and incidents of partnership real estate, in the absence of any agreement, express or implied, between the partners on the subject. It is, however, generally conceded that the question whether partnership real estate shall be deemed absolutely converted into personalty for all purposes, or only converted pro tanto for the purpose of partnership equities, may be controlled by the express or implied agreement of the partners themselves, and that where, by such agreement, it appears that it was

the intention of the partners that the lands should be treated and administered as personalty for all purposes, effect will be given thereto. In respect to real estate purchased for partnership purposes with partnership funds, and used in the prosecution of the partnership business, the English rule of "out and out" conversion may be regarded as properly applied on the ground of intention, even in jurisdictions which have not adopted that rule as applied to partnership real estate acquired under different circumstances, and where no specific intention appeared. The investment of partnership funds in lands and chattels for the purpose of a partnership business, the fact that the two species of property are in most cases of this kind so commingled that they cannot be separated without impairing the value of each, has been deemed to justify the inference that under such circumstances the lands as well as the chattels were intended by the partners to constitute a part of the partnership stock, and that both together should take the character of personalty for all purposes; and Judge Denio, in Collumb v. Read, supra, expressed the opinion that to this extent the English rule of conversion prevailed here. That paramount consideration should be given to the intention of the partners when ascertained, is conceedd by most of the cases. See Hoxie v. Carr, 1 Sumn. (U. S.) 183, Fed. Cas. No. 6,802; Fall River Whaling Co. v. Borden, 10 Cush. (Mass.) 462; Collumb v. Read, supra; T. Pars. Partn. § 267. The legal title to the real estate which the heirs of Edwin J. Darrow asked to have partitioned in this action was vested in Daniel O. Calkins at the time of the death of Darrow, in November, 1864. The plaintiffs, on the death of their father, took no legal estate in the lands. The legal estate which, prior to the 25th day of September, 1861, Darrow held in the undivided one-half of the premises, was by the deed executed by him on that day conveyed to Calkins. That this was the effect of the deed, we have no doubt. The deed is in terms full and ample to convey in fee the interest of Darrow to his grantee. It was coupled, however, with the declaration on the face of the deed that it was to be held by Calkins as partnership property, and the deed contained a power of management and sale, and this was followed by the significant clause, "And to pay over to the said Darrow, his heirs and assigns, or other legal representatives, such portion thereof as shall, at the closing of the partnership business of said Calkins and Darrow, belong to or be due or coming to said Darrow, his heirs, executors, assigns, or other legal representatives." The suggestion that the deed attempted to create an express trust in lands, not within the enumerated trusts permitted by section 55 of our statute of "Uses and Trusts" (1 Rev. St. 728), and was, therefore, void as a conveyance, is not well founded. It recognized a pre-existing trust imposed upon the lands, implied by law, and arising out of the partnership relation, and that the trust was to continue notwithstanding the conveyance of the legal title. This was not, we think, in contravention of the statute which contemplated the creation of original trusts, and not the abrogation of existing trusts

resulting from or implied by operation of law; nor did it render inoperative the subsequent recognition of such an existing trust in connection with a conveyance of the legal title. We think the legal title to the one-half part of the land passed by Darrow's deed, subject to the performance by Calkins of the trust therein declared. The important question is whether it operated to convert the partnership lands into personalty, and to change the interest of Darrow, or his representatives, from an interest in the land as realty into an interest in the proceeds of the lands, after a sale thereof by Calkins under the power contained in the deed. We are of opinion that it was the intention of the partners, disclosed on the face of the deed and by the surrounding circumstances, to substitute in place of Darrow's prior interest in the lands, as such, an interest in him and his representatives in any surplus which should remain after a sale by Calkins, and the adjustment of the partnership affairs. It is not necessary to decide whether the surplus, when ascertained, would go to the real or personal representatives of Darrow. As between Darrow and his representatives and Calkins and his representatives, the deed operated as a conversion of the lands into personalty. The personal representatives of Darrow were entitled to enforce, in an action for an accounting and an adjustment of the partnership affairs, the claims of Darrow's estate. This was the purpose of the action which resulted in the decree of October 31, 1867, and we think that decree was binding upon the plaintiffs, not on the ground that they were parties, but for the reason that, no controversy existing as to the original character of the property as partnership property, or as to the subsequent dealing between the partners in respect to it, the heirs of Darrow were not necessary parties to a final adjustment of the partnership affairs, including the interest of the Darrow estate growing out of his relation to the lands under the deed of September 25, 1861. It was open to the plaintiffs, on an accounting by the administratrix of the Darrow estate, to claim that the $14,000 received by her under the decree in the action for an accounting should be regarded as real, and not personal, assets, and that they were entitled to it in their character as heirs, and not as distributees. We think the order of the court below reversing the judgment at special term was correct, and it should therefore, be affirmed, and judgment absolute entered for the defendants on the stipulation, with costs.

Order affirmed.

SECTION 6.—NATURE OF PARTNER'S INTEREST IN PARTNERSHIP PROPERTY.

TAYLOR et al. v. FIELDS.

(Court of Exchequer, 1799. 4 Ves. 396.)

The point in this cause depended upon the general question whether a separate creditor of one partner can hold the partnership effects taken under an execution for his separate debt against the joint creditors of the partnership.

At the time the execution took place the partnership was insolvent; but a commission of bankruptcy had not then issued.

The court having taken some time to consider, the Lord Chief Baron delivered their opinion:

The right of the separate creditor under the execution depends upon the interest each partner has in the joint property. With respect to that we are of opinion that the corpus of the partnership effects is joint property, and neither partner separately has anything in that corpus, but the interest of each is only his share of what remains after the partnership accounts are taken.

In Skipp v. Harwood, 1 Ves. 239 (sub nom. West v. Skip), we see that, whatever the right of the partnership may be, it is not affected by what may happen between the individual partners. There is a distinction between the rights of the partners and the rights of the partnership. As between one partner and the separate creditors of the other, they cannot affect the joint stock any farther than that partner whose creditors they are could have affected it. In Fox v. Hanbury, Cowp. 445, Lord Mansfield was led to the consideration of a point that bears much upon this case; and, adverting to the case of Skipp v. Harwood, he states a passage of Lord Hardwicke's judgment from his own note rather stronger than it appears in the report: "If a creditor of one partner takes out execution against the partnership effects, he can only have the undivided share of his debtor, and must take it in the same manner the debtor himself had it, and subject to the rights of the other partner."

What is the manner in which the debtor himself had it? He had that which was undivided, and could only be divided by first delivering the effects from the partnership debts. He who comes in as his companion, as joint-tenant with him, according to this doctrine of Lord Hardwicke, must take it in the same manner the debtor himself had it, subject to the rights of the other partners.

Lord Mansfield having stated what, according to the course of the common law, as far as it respects trade between partners, is the rule, that a creditor taking out execution against a partner is directly in the

place of the partner debtor, proceeds to show that by the same rule, where a partner becomes bankrupt, the assignees are put in the place of the partner, in whose right they come in, and by no means, as was argued by Mr. Plumer, by any rule arising out of the bankrupt laws; for nothing is said in any one of those acts as to the creditors of a partnership and the separate creditors of one partner, but they only provide for the case of mutual debts and accelerating a debt upon a security payable at a future day. But the same common law, applied in the case where one partner becomes a bankrupt, provides that the assignee of the bankrupt shall be in the same situation as that in which a creditor taking out execution stood before those acts. This introduces all the cases of bankruptcy, which Mr. Plumer wished to exclude, as not applicable to a case in which there was no bankruptcy; and this case is to be considered as if no bankruptcy had taken place, as the execution was before the bankruptcy. In law there are three relations: First, if a person chooses for valuable consideration to sell his interest in the partnership trade, for it comes to that; or if his next of kin or executors take it upon his death; or if a creditor takes it in execution, or the assignees under a commission of bankruptcy. The mode makes no difference; but in all those cases the application takes place of the rule that the party coming in the right of the partner comes into nothing more than an interest in the partnership, which cannot be tangible, cannot be made available, or be delivered, but under an account between the partnership and the partner, and it is an item in the account that enough must be left for the partnership debts. * * * The question, therefore, recurs to the consideration, what it was that partner had, for the creditor cannot be entitled to any more. It therefore argues nothing to say he has the merit of diligence, till we see upon what that merit can attach. If the partner himself, therefore, had nothing more than an interest in the surplus beyond the debts of the partnership upon a division, if it turns out that at common law that is the whole that can be delivered to, or taken by, the assignee of a partner, the executor, the sheriff, or the assignee under a commission of bankruptcy, all that is delivered to the creditor taking out the execution is the interest of the partner in the condition and state he had it; and nothing was due to this partner separately, the partnership being insolvent. The whole property was due to the partnership creditors, and not to either partner.

STAATS v. BRISTOW.

(Court of Appeals of New York, 1878. 73 N. Y. 264.)

FOLGER, J. The defendant had the possession of certain personal property, to which the plaintiff claims that he was entitled. It was, of course, incumbent upon the plaintiff to show and establish his title. He showed that he was the purchaser at a sheriff's sale. The certi-

ficate given by the sheriff does not say that the plaintiff bought the property itself. It says that he bought only all the right, title, and interest which Joseph Stockbridge had in it on the 30th of November, 1874. The sheriff's return on the execution upon which he sold is the same. The execution on which the sale took place directed a sale of the property of the defendants therein named, who were the Stockbridge above named and his copartner, Martin; but the property pointed at was what they owned, or either of them owned, on a day named, to wit, on the 9th of December, 1874, and before that day, to wit, on the 4th day of that month, the defendants in the execution had assigned the property to the defendant in this action in trust for all of their creditors.

So it is apparent that the plaintiff did not buy the property itself specifically, but only the interest, right, and title which Stockbridge had in it. Now the interest which he had in it was that of one of two partners, as the property was part of the assets of a copartnership firm of which he was a member. The interest of a member of such a firm in the assets of it is the share to which he is entitled by the terms of the copartnership, in the surplus of those assets remaining after all partnership debts are fully paid. It appears in this case that the firm was insolvent, that its debts much exceeded its assets, and that there never could arise a surplus. So the interest of Stockbridge, as an individual, in this property was nothing; and so the plaintiff got nothing by his purchase.

Judgment for the defendant affirmed.

PRATT v. McGUINNESS et al.

(Supreme Judicial Court of Massachusetts, 1899. 173 Mass. 170, 53 N. E. 380.)

MORTON, J. This case was heard upon the pleadings and the master's report. There was a final decree and an appeal, and a request to the justice who heard the case to report the same, under St. 1883, c. 223, § 7. The case may be treated as here on appeal, and the report may be regarded as a finding under that statute of all the facts on which the decree was founded, namely, those stated in the master's report and those admitted by the pleadings. It is not necessary, to determine the power of a single justice, independently of the statute of 1883, to report a case to the full court after the entering of a final decree. The bill, as brought, alleges that the plaintiff is a half owner as tenant in common of certain personal property, and asks that the property be sold, and the proceeds divided, that a mortgage put upon the property by one of the defendants be declared void, and that he be required to account for certain rents and profits received from the property. The master has found that the person from whom the plaintiff derived his title had only an equitable interest in the property as a

member of a firm for which the legal title to it was held by one of the defendants as a part of the assets of the partnership. None of the plaintiff's exceptions to the master's report in regard to his findings of fact can be considered, because the evidence is not reported. It appears that at most the plaintiff has only an equitable interest in such assets of the partnership as may remain, if any, after settlement of the affairs of the partnership. He has nothing but that which he acquired from one of the partners, and, if the legal title to the chattels had been in the firm, he would not have acquired an ownership in the articles themselves. The title to personal property of a partnership is not in the individual members of the firm, so that they can convey an undivided share in any specific articles to another; but it is in the firm as an entirety, subject to the equities of the different members, and their right to have it applied to the payments of the debts of the partnership. Sanborn v. Royce, 132 Mass. 594; Pelletier v. Couture, 148 Mass. 269, 19 N. E. 400, 1 L. R. A. 863; Lovejoy v. Bowers, 11 N. H. 404; Fourth Nat. Bank v. Railroad Co., 11 Wall. (U. S.) 624, 20 L. Ed. 82; Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683; Tarbell v. West, 86 N. Y. 280; Beecher v. Stevens, 43 Conn. 587; Sirrine v. Briggs, 31 Mich. 443. It is questionable, upon the authorities, whether, upon a conveyance of an interest in only a part of the partnership property, a plaintiff could maintain a bill in equity for a settlement of the partnership affairs and an accounting. Assuming that he could, this bill was not brought for that purpose. * * * It is plain that this bill cannot be maintained.

Decree affirmed.

McKEE v. COVALT. BUCHER v. SAME.

(Supreme Court of Kansas, 1905. 71 Kan. 772, 81 Pac. 475.)

C. A. SMITH, J. The undisputed evidence in this case shows that the defendants Bucher and Mark were copartners prior to the purchase of the land in question, and that the land was purchased in a partnership transaction, and, so far as paid for, was paid for by an exchange of partnership property; that the firm continued doing an active business until about 1893 or 1894, when it ceased, but there was no formal dissolution of the firm, and no accounting or settlement of the firm affairs. The firm property, including the land in question, was responsible for the debts of the firm, and was turned over to Bucher to settle and adjust. He rented the land for a time, and applied the rent on the firm's indebtedness; and when Covalt took the quitclaim deed from Mark he had knowledge of the fact, or at least sufficient information to put him upon his inquiry, that the land was partnership assets, and he was bound to take notice of the rights of the parties as well as of the rights of the creditors of the firm. The partners jointly held the land in trust for the firm, and neither owned an undivided one-half

interest therein individually, and neither had a right to sell the land or his interest therein except for the purpose of paying the obligations of the firm, until all of the firm debts had been paid and the affairs of the copartnership wound up.

[The judgment of the district court, quieting the title of the grantee of the partner attempting to convey a one-half interest in the firm property, was reversed.]

PENNYBACKER v. LEARY.

(Supreme Court of Iowa, 1884. 65 Iowa, 220, 21 N. W 575.)

Action in chancery. Upon a trial on the merits, plaintiff's petition was dismissed. He now appeals to this court.

BECK, J. 1. The petition alleges that the parties entered into a parol contract of partnership for the purchase and sale of certain tracts of land, containing together 400 acres; that in pursuance of this contract the lands were purchased and the title conveyed to defendant, and that thereby they each became the owner of an undivided one-half thereof. The special relief prayed for is that the interest of the parties be confirmed, and that the lands be partitioned accordingly. The petition also asks for general relief. The answer of the defendant denies the contract of partnership, and the interest claimed by plaintiff in the lands. Other allegations of the pleadings need not be recited here. * * *

3. But defendant insists and pleads as a defense, in his answer, that as the contract was for the purchase of an interest in lands, and was wholly oral, it cannot be enforced under the statute of frauds. The contract, to be truly stated, amounted to a parol agreement for the creation of a partnership, the object of which was to acquire and sell certain lands. The part of the agreement obligating the parties to purchase the land was but an incident of the contract of partnership. It provided for the subject and manner of investment of the capital of the firm. It was simply an agreement that the firm would buy the lands. By this agreement neither party bought or sold lands. It was not an agreement for the purchase and sale of lands. It was nothing more than an agreement that the firm should buy lands of another which should be held as firm property. It was not, therefore, an agreement or contract under which an interest in or title to lands was attempted to be transferred. It simply provides what interest the parties shall have therein when the lands shall be acquired as provided by the contract. Surely, if two persons agree to enter into a partnership for the purchase and sale of dry goods, and therein specify the manner of the contribution of the capital of the firm and the goods to be purchased therewith, and the persons of whom they shall be purchased, the contract could not be regarded as creating or transferring any prop-

erty or interest in the goods intended to be purchased. There is no distinction in principle between that case and this. We conclude that the contract in question is not within the contemplation of our statute of frauds, which provides that no evidence of a contract "for the creation or transfer of any interest in lands, except leases for a term not exceeding one year," is competent, "unless it be in writing and signed by the party to be charged, or by his lawfully authorized agent." Code, § 3663. * * *

4. It will be observed that the lands, as we have before stated, were not purchased by the contract for the copartnership, but by a subsequent purchase made in pursuance thereof. The case then assumes the aspect of the purchase of lands by a copartnership. While the title of the lands was, under this purchase, vested in defendant, they were really held by him in trust as partnership property. Plaintiff's interest in the lands is that of a partner, as prescribed by the contract of copartnership. It is plain that plaintiff is not entitled to a partition of the lands, as he specially prays in his petition. Defendant furnished the money to purchase the lands, and under the contract of copartnership he is to be allowed a return thereof, with 10 per centum interest. After the sale of the lands and the repayment of the sum he advanced, with interest and taxes, the lands or the profits, if a sale shall be made, are to be divided between the parties. Plaintiff is entitled to no part of the lands or profits until defendant be paid and the partnership be settled. It is not made to appear that plaintiff is entitled now to enforce a sale of the lands and the final settlement of the partnership, if such relief could be granted under the general prayer of his petition. He is surely not entitled to a partition of the lands for which he specially prays. We therefore think that his petition ought to be dismissed, but he ought not to be precluded from seeking in a proper action the settlement of the partnership and the recovery of his interest as a partner in the lands, or the profits thereof, whenever he may be able to establish his right to enforce such a settlement of the partnership. The petition is therefore dismissed, without prejudice to such an action.

Affirmed.

MOLINEAUX v. RAYNOLDS et al.

(Court of Chancery of New Jersey, 1896. 54 N. J. Eq., 559, 35 Atl. 536.)

Reed, V. C. This bill is filed for a partition of a tract of land, upon which is a factory, at Bergen Point, N. J. It is admitted that the present owners of the property are Charles T. Raynolds, Thomas B. Hidden, the two defendants, and Gen. Molineaux, the complainant. It is also admitted that they own it as partners. It is admitted by counsel that, if the property is subject to a partition suit, it should be sold, and

not divided. Two questions are presented for solution: The first is whether the suit for partition is well brought. If it is properly brought then the second question is, what are the proportionate interests of the owners in the property? * * *

The first question mooted springs out of the existence of the De Floras suit. The counsel for the defendants insist that, so long as any claim against the old firm remains unsatisfied, so long each partner has a right to have the firm assets held as such to be applied in liquidation of the claim; that until all such claims are satisfied no partner has a right to demand a division of the firm property. The equitable rule thus invoked is entirely settled. The property of a firm, whether personal or real, is a fund to be primarily applied to the payment of its debts; and each partner has a right to have it so appropriated, to the end that he himself may be relieved from any personal liability to answer for the firm debts. In England, land as well as personalty belonging to a firm is regarded as personal assets. Lindl. Partn. par. 343. In this country the land is held to be personal assets so far only as it may be needed to pay firm creditors. National Bank of Metropolis v. Sprague, 20 N. J. Eq. 13; Freem. Co-Ten. par. 118. Out of this equity of each partner to have the firm property applied to the payment of firm debts, in order that he may be discharged from personal liability, has emerged the rule that the partition of the real property of a firm will not be decreed, so long as debts of the partnership remain unliquidated. Pennybacker v. Leary, 65 Iowa, 220, 21 N. W. 575; Kruschke v. Stefen, 83 Wis. 373, 53 N. W. 683; Mendenhall v. Benbow, 84 N. C. 646; Freem. Co-Ten. par. 443. By the rule laid down in these cases, the only method by which a partner, under such conditions, can compel a division of the firm property, is by a bill to administer and settle the partnership affairs. It is apparent, however, that, inasmuch as the ground for refusing partition is that partners may be protected from future calls to pay firm debts, therefore, if it should be made to appear that the property involved in the application for partition will not be needed to meet such obligations, the objection to the distribution of the property disappears. Now, it appears in this case that there is other real estate in Brooklyn, belonging to this firm, of the value of $150,000. It also appears that the De Floras suit is pending in the courts of New York. The property and the pending suit are therefore both in the state of the firm's domicile. It is beyond the realms of probability that the final judgment in the De Floras suit, which suit has been dragging along for 20 years, can reach an amount which will begin to exhaust the Brooklyn property. Although it appears that a proceeding for partition of that property also had been commenced in the courts of New York, that proceeding has not gone to a decree, and it is in that suit that the defense set up here can be more appropriately interposed. Under these conditions, I do not see any substantial ground for thinking that the interest of any member

of the firm will be menaced by the severance of the title to this property as is proposed by this suit. * * *

I will advise a decree in conformity to these views.

SECTION 7.—TRANSFER OF PARTNERSHIP PROPERTY.

I. By Act of the Firm.

Ex parte RUFFIN.

(In Chancery, before Lord Eldon, C., 1801. 6 Ves. 119.)

In June, 1797, Thomas Cooper, of Epsom, brewer, took James Cooper into partnership. That partnership was dissolved by articles dated the 3d of November, 1798, under which the buildings, premises, stock in trade, debts, and effects were assigned to James Cooper by Thomas Cooper, who retired from the trade. Upon the 2d of April, 1800, a commission of bankruptcy issued against James Cooper, under which the joint creditors attempted to prove their debts, but the commissioners refused to permit them, upon which a petition was presented to Lord Rosslyn, who made an order that the joint creditors should be at liberty to prove, with the usual directions for keeping distinct accounts, and an application of the joint estate to the joint debts and of the separate estate to the separate debts. At a meeting for the purpose of declaring a dividend, the commissioners postponed the dividend, in order to give an opportunity of applying to the Lord Chancellor, in consequence of which, this petition was presented, praying that the partnership effects remaining in specie and possessed by the assignees may be sold, and that the outstanding debts may be accounted joint estate.

By the articles of dissolution the parties covenanted to abide by a valuation to be made of the partnership property, and James Cooper covenanted to pay the partnership debts then due and to indemnify Thomas Cooper against them, and Thomas Cooper covenanted not to carry on the trade of brewer for 20 years within 20 miles of Epsom. A bond for £3,000, the calculated value of the partnership property assigned, was given to Thomas Cooper by James Cooper and his father, as surety. In pursuance of the covenant, the partnership property, consisting of leases, the premises where the trade had been carried on, stock, implements, outstanding debts, and other effects, were valued by arbitrators at £2,030, after charging all the partnership debts then due. James Cooper, by his affidavit, stated that all the joint creditors knew of the dissolution and the assignment of the property, that ad-

vertisements were published, and the deponent, after the dissolution, received many debts due to the partnership, but paid more on account of the partnership. His father, by affidavit, stated that he paid the interest of the bond regularly, and intended to pay the principal when due.

ELDON, L. C. This case is admitted, unless Ex parte Burnaby, 1 Cooke's Bank. Law (4th Ed.) 253, applies to it, to be new in its circumstances. Therefore, if I was of opinion that the petition could be supported, I should be very unwilling to express that in bankruptcy, where my opinion would not be subject to review. If the case I have mentioned has decided the point, there is the authority of Lord Hardwicke upon it, which would weigh down the most considerable doubt that I could be disposed to entertain. I feel great difficulty in complying with the prayer of the petition, and, when I read it, was struck with it as a new case, and as one upon which I do not clearly see my way to the relief prayed. It is the case of two partners who owed several joint debts and had joint effects. Under these circumstances their creditors, who had a demand upon them in respect of those debts, had clearly no lien whatsoever upon the partnership effects. They had the power of suing, and by process creating a demand that would directly attach upon the partnership effects. But they had no lien upon or interest in them in point of law or equity. If any creditor had brought an action, the action would be joint. His execution might be either joint or several. He might have taken in execution both joint and separate effects. It is true that the separate creditors of each, by bringing actions, might acquire a certain interest even in the partnership effects, taking them in execution in the way in which separate creditors can effect such property. But there was no lien in either.

The partnership might dissolve in various ways: First, by death; secondly, by the act of the parties, that act extending to nothing more than mere dissolution, without any special agreement as to the disposition of the property, the satisfaction of the debts, much less any agreement for an assignment from either of the partners to the others. The partnership might also be dissolved by the bankruptcy of one or both and by effluxion of time. If it dissolved by death, referring to the law of merchants and the well-known doctrine of this court, the death being the act of God, the legal title in some respects, in all the equitable title, would remain notwithstanding the survivorship; and the executor would have a right to insist that the property should be applied to the partnership debts. I do not know that the partnership creditors would have that right, supposing both remained solvent. So, upon the bankruptcy of one of them, there would be an equity to say the assignees stand in the place of the bankrupt, and can take no more than he could, and, consequently, nothing until the partnership debts are paid. So, upon a mere dissolution without a special agreement, or a dissolution by effluxion of time, to wind up the accounts, the debts must be paid, and the surplus be distributed in proportion to

the different interests. In all these ways the equity is not that of the joint creditors, but that of the partners with regard to each other, that operates to the payment of the partnership debts. The joint creditors must of necessity be paid, in order to the administration of justice to the partners themselves. When the bankruptcy of both takes place, it puts an end to the partnership certainly. But still it is very possible, and it often happens in fact, that the partners may have different interests in the surplus, and out of that a necessity arises that the partnership debts must be paid; otherwise, the surplus cannot be distributed according to equity, and no distinction has been made with reference to their interests, whether in different proportions or equally. Many cases have occurred upon the distribution between the separate and joint estates, and the principle in all of them, from the great case of Mr. Fordyce, has been that, if the court should say that what has ever been joint or separate property shall always remain so, the consequence would be that no partnership could ever arrange their affairs. Therefore a bona fide transmutation of the property is understood to be the act of men acting fairly, winding up the concern, and binds the creditors; and therefore the court always let the arrangements be as they stand, not at the time of the commission, but of the act of bankruptcy.

Thomas Cooper is admitted to be solvent. He certainly has no such equity as if the partnership had been dissolved by bankruptcy, death, effluxion of time, or any other circumstance not his own act. But he dissolves the partnership a year and a half ago, and, instead of calling upon these effects according to his equity at the dissolution to pay the partnership debts, he assigns his interest to the other, to deal as he thinks fit with the property, to act with the world respecting it, desiring only a bond to pay a given value in three or four years. Therefore he or his executors could not sue. If it was necessary for the creditors to operate their relief through his equity, he has no equity. It is then said, and the circumstance had struck me, that all the property is not assignable at law—for instance, the debts; but, as between the two Coopers they were the property of the bankrupt, for debts are within the statute of King James, and, if left in the order and disposal of the bankrupt, he is proprietor of the debt. Therefore Thomas Cooper could never set up the insufficiency of the legal operation of the assignment against his own deed. The assignment was not made subject to the payment of the debts, but in consideration of a covenant, leaving no duty upon the property, but attaching a personal obligation upon the assignee to pay the debts. The creditors, therefore, cannot rest upon the equity of the partner going out. I was struck with the argument of inconvenience. The inconvenience on all sides is great. To say this seems to me a monstrous proposition: That which, at any time during the partnership, has been part of the partnership effects, shall in all future time remain part of the partnership effects, notwithstanding a bona fide act. Suppose, an improbable case, that the partners

in Child's house chose to shift their shop from Temple Bar to the west end of town; and that house, now the property of the partnership, was bona fide bought by one of the partners, and the money was invested in the purchase of the new house in which they were going to reside; suppose, a still more improbable case, that a year and a half or ten years afterwards they became bankrupt—would that house be part of the partnership effects? It would be so, if it remained without legal interest being passed, or without any equitable claim, taking it out of the reach of a legal execution; but where the effect is a bona fide transaction of this sort, if it were held at any time afterwards to be partnership property, not for the purpose of satisfying demands of the partners, or of any creditor who cannot otherwise be satisfied, but to enable them to undo all the intermediate equities, commercial transactions could not go on at all. It would be much less inconvenience to examine the bona fides of each transaction than to say such transactions shall never take place.

The case of West v. Skip, 1 Ves. 237, falls within some of the observations I have made. Heath v. Percival, 1 P. Wms. 682, does not apply at all. The bond in that case was not given up; and therefore the creditor keeping the best security, and refusing to part with it, no inference can be made against the conclusion arising from that. Hankey v. Garratt, 1 Ves. 236, is also very different. There the partnership was dissolved by bankruptcy or by death, and there was no actual transfer of the property to take it out of the reach of legal execution. I am unwilling to make any observation upon Burnaby's Case. I do not know how to understand it. Whether there was anything special in the assignment, I cannot find out from the report. I shall endeavor to find the papers. It looks very like this case. If it is in specie this case, as an authority I should think myself bound to submit to it. But, if it is not in specie this case, there is so much doubt whether this relief can be given that I am satisfied it ought to be given, if at all, in a jurisdiction where my opinion would be subject to review. My present inclination is that the creditors have not this equity. I have considerable doubt, also, whether, if they have it, Thomas Cooper would be benefited by it; and a further subject of grave and serious doubt is, whether, if the joint creditors disturb the arrangement, the separate creditors would not have a right to set the arrangement right at his expense.

I now think there is a circumstance which distinguishes Burnaby's Case. The assignment was not by one to the other two, but by one to one of the other two, which may be very different. I think that circumstance distinguishes the case so much that I shall consult the interest of the parties better by saying they may file a bill, if they think proper, than by further delay.

The petition was dismissed.

DARBY et al. v. GILLIGAN et al.

(Supreme Court of Appeals of West Virginia, 1889. 33 W. Va. 246, 10 S. E. 400, 6 L. R. A. 740.)

SNYDER, P. Appeal from a decree of the circuit court of Taylor county, pronounced March 28, 1887, in the suit of Darby & Co. and others against John J. Gilligan and others. The suit was brought to set aside a trust deed made by said Gilligan to John T. McGraw, trustee; to enjoin said trustee from disposing of the property thus conveyed to him; and to have the same applied to the payment of the plaintiffs' debts. On September 17, 1883, the said Gilligan and James Burns entered into an agreement in writing, whereby they agreed to form a partnership for conducting a general merchandising business in the town of Grafton, Taylor county, Gilligan having prior to that time been merchandising at the same place, and having then on hand a stock of goods, which he put into the firm at the value of $2,000, and Burns paid into the firm $1,000. Upon this capital stock, they agreed that Gilligan should have a two-thirds and Burns a one-third interest in the assets, business, and profits of the partnership. At the time this partnership was formed, Gilligan was indebted to the First National Bank of Grafton and others in the sum of $1,100, for money borrowed and put into the mercantile business while he was conducting it alone. During the carrying on of the business by the firm, the firm contracted debts to the plaintiffs and others, and the partners so managed the business that they and the firm became indebted, to insolvency. Afterwards, on February 27, 1885, by a contract in writing, the partnership was dissolved, upon the terms that in consideration of $1,000, for which Gilligan executed to Burns his note, payable one year from that date, Burns withdrew from the firm, and Gilligan assumed, and agreed to pay, all the then existing indebtedness of the firm. About two months after, on April 24, 1885, Gilligan conveyed to John T. McGraw the whole of the assets of the late firm, in trust, to secure all his debts, including the debts due the plaintiffs and others by said firm; but in said conveyance he preferred the aforesaid $1,100 due to the Grafton Bank and others, the note for $1,000 given to Burns as aforesaid, which had been assigned by him to Anna Burns, and other individual debts, amounting in the aggregate to more than the value of the assets conveyed. Upon these facts the plaintiffs, the appellants here, contend that this attempt of Gilligan to prefer and pay his individual debts out of the said assets is a fraud upon the firm creditors, which, according to well-settled principles, a court of equity will not permit. Ordinarily the partnership estate is liable for the payment of the firm debts, in preference to the individual debts of the partners. This is the right of the partners inter se. The creditors of the partnership have no such right of priority over the creditors of the partners individually, otherwise than by substitution to the

rights of the partners inter se. The partners may release this right, and, if they do so bona fide, the creditors of the partnership cannot complain; for it is not their right, except subject to the proper disposition and control of the partners themselves, to whom it belongs. This right is generally called the "partner's lien." It differs from a common-law lien in that it is not dependent on possession, and any single partner can convey a good title to specific chattels by a bona fide sale in the course of trade; and a lien does not involve the right to deal with the property, whereas the partner's equity is a right to have it applied for certain purposes, and the one partner cannot assert the lien as a sole plaintiff. The existence of this equity may be explained in a variety of ways, as on an implied contract that the assets shall not be used for private purposes; on the doctrine of suretyship, since each partner is liable in solido for the debts, and therefore, inter se, virtually a surety for the copartners for their proportions, and entitled to have the assets applied so as to relieve him. The partners have jointly the same right of absolute disposition of their joint property that any individual has. They may sell it, pledge it, convert it into other forms, divide it up among themselves, devote it to the payment of all or part of the debts, or exercise other ownership over it, subject only to each other's rights, and to the operation of statutes forbidding voluntary or fraudulent conveyances, to hinder, delay, and defraud creditors. It is clear from what has preceded that while the partnership is solvent and going on the partners may, by unanimous assent or joint act, do what they please with the assets, if the act is bona fide. Where, in such case, one partner sells or assigns his interest to the other, bona fide, for a valuable consideration, or an agreement to pay the debts of the firm, and indemnify against them, this will change the joint into a separate property. The only question is upon the bona fides of the transaction. If such an arrangement could not be made, a partner never could retire. Bates, Partn. §§ 559, 820, 824; Story, Partn. §§ 97, 360. On the other hand, according to the better reason and the weight of authority, if the firm is insolvent, or on the eve of insolvency, and both of the partners are insolvent, a purchase by one partner of the interest of the other, in consideration of the former's assumption of all the debts of the firm, will be regarded as a purchase upon a consideration which is of no value whatever; and, no equivalent having been given, the transfer is in effect voluntary, and its only effect, if sustained, would be to hinder partnership creditors, and hence is deemed ineffectual to convert the joint property into separate property, as against the firm creditors. Ex parte Mayou, 4 De Gex, J. & S. 664, 11 Jur. (N. S.) 433, 12 Law T. (N. S.) 254; Sanderson v. Stockdale, 11 Md. 563; Phelps v. McNeely, 66 Mo. 554, 27 Am. Rep. 378; Tenney v. Johnson, 43 N. H. 144; Marsh v. Bennett, 5 McLean (U. S.) 117, Fed. Cas. No. 9,110; Roop v. Herron, 15 Neb. 73, 17 N. W. 353; In re Cook, 3 Biss. 122,

Fed. Cas. No. 3,150; Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605; Ransom v. Van Deventer, 41 Barb. (N. Y.) 307; Menagh v. Whitwell, 52 N. Y. 116, 163, 11 Am. Rep. 683; Shackelford v. Shackelford, 32 Grat. (Va.) 503; Farmers' Bank v. Smith, 26 W. Va. 541.

In the case at bar the firm as well as the individual partners were indebted, to insolvency, at the time the contract of dissolution was made, by the terms of which Gilligan assumed to pay, not only the debts of the firm, but $1,000 to Burns. As the firm and Gilligan were then both insolvent, there was no valuable consideration for either this assumption of the firm debts or said $1,000. Less than two months after this transaction, Gilligan, without paying a single firm debt, so far as the record shows, assigned all the assets in such a manner as to devote the whole of them to the payment of his individual debts. It seems to me plain that to uphold this scheme, against the rights of the social creditors, would violate, not only the general principles of equity, but the express provisions of our statute against voluntary and fraudulent conveyances. It is, however, claimed for the appellees that if this transaction is held void as to the firm creditors, then, for the like reasons, the act of Gilligan in putting his own stock of goods into the firm must be held void as to his individual creditors. But there is no analogy in the two transactions. It does not appear that either Burns or Gilligan was insolvent at that time, and it does appear that Burns paid into the concern $1,000, and also that the debts due the plaintiffs and others were contracted by the firm on the faith of the social assets. For these reasons the decree of the circuit court is reversed, and the cause remanded.

ARNOLD v. HAGERMAN et al.

(Court of Errors and Appeals of New Jersey, 1889. 45 N. J. Eq. 186, 17 Atl. 93, 14 Am. St. Rep. 712.)

On July 17, 1883, John C. Farr, having a lumber business in Hoboken and a wood manufacturing business in Asbury Park, formed a copartnership in the latter business with John H. Hagerman and John S. Fielder, under the name of J. C. Farr & Co. Hagerman and Fielder each gave to Farr his notes for $7,500, and thereupon property already in the business at Asbury Park became the capital of the new firm. On October 29, 1883, the new firm, being embarrassed, dissolved, and Hagerman and Fielder assigned all their interest in the business and property of the partnership to Farr; Farr returning to them the notes aforesaid, and agreeing to pay the debts of the firm. On November 30, 1883, Farr assigned all his property to Benjamin W. Arnold for the purpose of securing to his creditors an equal distribution of his property and effects, pursuant to the statute. In January, February, and March, 1884, the Second National Bank of Red Bank recovered several judgments against the members of the firm of J. C.

Farr & Co. for partnership debts, and caused executions thereon to be levied upon what had been the property of said firm. On March 10, 1881, the bank filed its bill against Farr, Hagerman, Field, Arnold, and others to have said assignments by Hagerman and Fielder to Farr, and by Farr to Arnold, set aside as fraudulent against the creditors of J. C. Farr & Co. The court below held the assignments by Hagerman and Fielder to Farr to be void.[1]

DIXON, J. * * * In equity a partnership is for some purposes deemed a single entity. Thus, when the property involved in the business of a partnership is to be applied by a court of equity to the payment of debts, that property is treated as belonging, not to the persons composing the firm, but to a distinct debtor, the partnership, and is used first to liquidate the debts contracted in the business of that debtor, and only the surplus, if any, is surrendered to the individual partners. This equitable practice rests upon the presumed intention of the partners themselves, and hence is primarily considered as their equitable right against each other. Consequently, since the decision of Lord Eldon in Ex parte Ruffin, 6 Ves. 119, it has been generally held that the partners could put an end to this right, and that if, by their agreement, the partnership is dissolved, and its property is assigned to one of their number, or to a stranger, as his own, without reservation of the right, the right to have partnership debts paid out of that property is extinct. Growing out of this right of partners has arisen a corresponding equity in partnership creditors to have their debts first satisfied out of the firm property, which is now deemed a substantial element of their demands. Generally it may be said that this equity of creditors continues only so long as the right of the partners against each other subsists, and perishes when that terminates; but this is not universally true, for this equity may survive the right to which, ordinarily, it is attached. In this respect it resembles the claim which the general creditors of an individual have upon his property. It is neither an estate nor a lien. It is, ordinarily, but a right by lawful procedure to acquire a lien during the ownership of the debtor; yet, under certain circumstances, that lien may be acquired after the debtor's ownership has ended. This results from the provisions of the ancient statute for the prevention of frauds and perjuries, by force of which, when a person has alienated his property with intent to hinder, delay, or defraud his creditors, the rights of those creditors remain as if no alienation had taken place, except against the claims of bona fide purchasers, for good consideration, without notice. Equity applies this statute to a partnership, its property and creditors, just as it would in case of an individual, and therefore, while generally it is true that a partnership may defeat the equity of its creditors by the alienation of its property and consequent

[1] A bill by Hagerman and Fielder against Farr to set aside their assignment to him because procured by fraud was considered in this case and dismissed. The portion of the opinion dealing with this bill is omitted.

extinguishment of the right of its partners inter se, yet, if the alienation be effected with intent to hinder, delay, or defraud the firm creditors by defeating their equity, the claims of creditors will be unimpaired, and the property will be treated as partnership assets, unless it shall have passed into the hands of those whom the statute protects. This doctrine has repeatedly been recognized in the courts of New Jersey. [After reviewing New Jersey cases, the opinion continues:]

The case before us comes clearly within the reach of this principle. At the time of the transfer by Hagerman and Fielder to Farr the insolvency of each of these persons, and of the firm of J. C. Farr & Co., was patent to them all, and, indeed, was the moving cause of the transfer. They all knew that, in the condition of affairs then existing, none of them could meet maturing obligations, and it was in the hope of facilitating an extension or compromise with creditors that the transfer was made. The transfer embraced all the partnership property. If valid in all respects, it appropriated the shares of Hagerman and Fielder to the payment of the debts of Farr, for which those shares were previously not liable, and left Hagerman and Fielder without any property whatever, as we gather from the testimony, to pay their debts. Inevitably, therefore, by defeating the equity of the partnership creditors, it would hinder them in the collection of their just claims. It is a reasonable inference that these partners intended this manifest effect of their act, and consequently the assignment by Hagerman and Fielder to Farr must, according to the terms of the statute, be deemed void as against the partnership creditors. Not only upon the ground of a common intent to hinder partnership creditors, thus inferred from the knowledge which all parties must have had of the necessary consequences of the transfer itself, but also upon the ground that the transfer was made without valuable consideration—was voluntary in the legal sense—it should be decreed invalid against the partnership creditors, all of whose debts were then in existence. Haston v. Castner, 31 N. J. Eq. 697. The consideration nominally given by Farr to Hagerman and Fielder was the surrender of their notes and his covenant to indemnify them against firm creditors. But according to the testimony those notes were payable only out of the profits accruing to Hagerman and Fielder from the firm of J. C. Farr & Co., and as that firm had failed, and was dissolved without realizing any profits, the notes had become absolutely valueless. Farr's covenant to indemnify does not constitute a valuable consideration, since he may be relieved therefrom on the total failure of the transfer for which it was made. 2 Pom. Eq. Jur. §§ 751, 969; notes to Basset v. Nosworthy, 2 Lead. Cas. Eq. 82; Haughwout v. Murphy, 22 N. J. Eq. 531. It thus appearing that, notwithstanding this transfer, all the rights and remedies of the creditors of J. C. Farr & Co. remained against the firm property in the hands of Farr, we are brought to consider the assignment to Arnold for the benefit of Farr's creditors. [The remainder of the opin-

ion holding the assignment by Farr to Arnold to be valid, the creditors of J. C. Farr & Co. being given priority in the distribution of the assets of J. C. Farr & Co. in the hands of Arnold, is omitted, as is also the dissenting opinion of MAGIE, J.][2]

CASE v. BEAUREGARD.

(Supreme Court of the United States, 1878. 99 U. S. 119, 25 L. Ed. 370.)

STRONG, J. The object of this bill is to follow and subject to the payment of a partnership debt property which formerly belonged to the partnership, but which, before the bill was filed, had been transferred to the defendants. There is little, if any, controversy respecting the facts, and little in regard to the principles of equity invoked by the complainant. The important question is whether those principles are applicable to the facts of the case.

No doubt the effects of a partnership belong to it so long as it continues in existence, and not to the individuals who compose it. The right of each partner extends only to a share of what may remain after payment of the debts of the firm and the settlement of its accounts. Growing out of this right, or rather included in it, is the right to have the partnership property applied to the payment of the partnership debts in preference to those of any individual partner. This is an equity the partners have as between themselves, and in certain circumstances it inures to the benefit of the creditors of the firm. The latter are said to have a privilege or preference, sometimes loosely denominated a "lien," to have the debts due to them paid out of the assets of a firm in course of liquidation, to the exclusion of the creditors of its several members. Their equity, however, is a derivative one. It is not held or enforceable in their own right. It is practical-

[2] On the question whether a chattel mortgage by an insolvent partnership to secure the debts of its members was fraudulent as to firm creditors, the court in Bergman v. Jones, 10 N. D. 520, 88 N. W. 284, 88 Am. St. Rep. 739 (1901) said: "The mortgage in question is void as to creditors for another reason. When the mortgage was given the partnership was insolvent. The mortgage covered practically all, if not all, of the partnership property, and it undertook to secure the individual debts of the partners, which debts the partnership was under no legal or moral obligation to pay. In short, it was an attempted gift by an insolvent partnership of all of its property. This cannot be done. There is entire harmony in the authorities on this point. 'A partnership, paying the private debt of one of its members, is paying what it is not liable for in law, equity, or morals, and is, in effect, giving away its property; and such conveyance, no bona fide rights intervening, is fraudulent and void as to existing creditors if they are prejudiced thereby, as well as to the separate creditor of the other partner, whose individual interest in the firm is thus given away.' 1 Bates on Partnership, § 566. See, also, Ransom v. Vandeventer, 41 Barb. (N. Y.) 307; Keith v. Fink, 47 Ill. 272; Heineman v. Hart, 55 Mich. 64, 20 N. W. 792; Cron v. Cron, 56 Mich. 8, 22 N. W. 94; Wilson v. Robertson, 21 N. Y. 587; Ferson v. Monroe, 21 N. H. 462; Patterson v. Seaton, 70 Iowa, 689, 28 N. W. 598; Menagh v. Whitwell, 52 N. Y. 147, 11 Am. Rep. 683; Keith v. Armstrong, 65 Wis. 225, 26 N. W. 445."

ly a subrogation to the equity of the individual partner, to be made effective only through him. Hence, if he is not in a condition to enforce it, the creditors of the firm cannot be. Rice v. Barnard et al., 20 Vt. 479, 50 Am. Dec. 54; Appeal of York County Bank, 32 Pa. 446. But so long as the equity of the partner remains in him, so long as he retains an interest in the firm assets as a partner, a court of equity will allow the creditors of the firm to avail themselves of his equity, and enforce, through it, the application of those assets primarily to payment of the debts due them, whenever the property comes under its administration.

It is indispensable, however, to such relief, when the creditors are, as in the present case, simple contract creditors, that the partnership property should be within the control of the court and in the course of administration, brought there by the bankruptcy of the firm, or by an assignment, or by the creation of a trust in some mode. This is because neither the partners nor the joint creditors have any specific lien, nor is there any trust that can be enforced until the property has passed in custodiam legis. Other property can be followed only after a judgment at law has been obtained and an execution has proved fruitless.

So, if before the interposition of the court is asked the property has ceased to belong to the partnership, if by a bona fide transfer it has become the several property either of one partner or of a third person, the equities of the partners are extinguished, and consequently the derivative equities of the creditors are at an end. It is, therefore, always essential to any preferential right of the creditors that there shall be property owned by the partnership when the claim for preference is sought to be enforced. Thus, in Ex parte Ruffin, 6 Ves. 119, where from a partnership of two persons one retired, assigning the partnership property to the other, and taking a bond for the value and a covenant of indemnity against debt, it was ruled by Lord Eldon that the joint creditors had no equity attaching upon the partnership effects, even remaining in specie; and such has been the rule generally accepted ever since, with the single qualification that the assignment of the retiring partner is not mala fide. Kimball v. Thompson, 13 Metc. (Mass.) 283; Allen v. Valley Co. et al., 21 Conn. 130, 54 Am. Dec. 333; Ladd v. Griswold, 9 Ill. 25, 46 Am. Dec. 443; Smith v. Edwards, 7 Humph. (Tenn.) 106, 46 Am. Dec. 71; Robb v. Mudge, 14 Gray (Mass.) 534; Baker's Appeal, 21 Pa. 76, 59 Am. Dec. 752; Sigler & Richey v. Bank, 8 Ohio St. 511; Wilcox v. Kellogg, 11 Ohio, 394.

The joint estate is converted into the separate estate of the assignee by force of the contract of assignment; and it makes no difference whether the retiring partner sells to the other partner or to a third person, or whether the sale is made by him or under a judgment against him. In either case his equity is gone. These principles are settled by very abundant authorities. It remains, therefore, only to consider

whether, in view of the rules thus settled and of the facts of this case, the complainant, through any one of the partners, has a right to follow the specific property which formerly belonged to the partnership, and compel its application to the payment of the debt due from the firm to the bank of which he is the receiver.

The partnership, while it was in existence, was composed of three persons, May, Graham, and Beauregard; but it had ceased to exist before this suit was commenced. It was entirely insolvent, and all the partnership effects had been transferred to others for valuable considerations. None of the property was ever within the jurisdiction of the court for administration.

On the 8th of May, 1867, Graham, one of the partners, assigned all his right and interest in any property and effects of the partnership, and whatever he might be entitled to under the articles thereof, together with all debts due to him from the partnership or any member thereof, to the Fourth National Bank of the City of New York. By subsequent assignments, made on the 14th and 16th of May, 1869, May, the second partner, transferred all his interest in the partnership property to the United States, and by the same instruments transferred to the United States, by virtue of a power of attorney which he held, the interest of Graham. On the 21st of August, 1867, the United States sold and transferred their interest obtained from May and Graham in all the partnership property, including real estate, to Alexander Bonneval, Joseph Hernandez, and George Binder. On the 15th of October next following an act of fusion was executed between the New Orleans & Carrollton Railroad Company, Beauregard, Bonneval, Hernandez, and Binder, by which the rights of all the parties became vested in the railroad company, subject to the debts and liabilities of the company, whether due or claimed from the lessee or the stockholders.

The effect of these transfers and act of fusion was very clearly to convert the partnership property into property held in severalty, or, at least, to terminate the equity of any partner to require the application thereof to the payment of the joint debts. Hence if, as we have seen, the equity of the partnership creditors can be worked out only through the equity of the partners, there was no such equity of the partners, or any one of them, as is now claimed, in 1869, when this bill was filed. No one of the partners could then insist that the property should be applied first to the satisfaction of the joint debts, for his interest in the partnership and its assets had ceased. Baker's Appeal, 21 Pa. 76, 59 Am. Dec. 752. That was a case where a firm had consisted of five brothers. Two of them withdrew, disposing of their interest in the partnership estate and effects to the other three; the latter agreeing to pay the debts of the firm. Some time after one of the remaining sold his interest in the partnership property to one of the remaining two partners. The two remaining, after contracting debts, made an assignment of their partnership property to pay the

debts of the last firm composed of the two; and it was held that the creditors of the first two firms had no right to claim any portion of the fund last assigned, and that it was distributable exclusively among the creditors of the last firm. So in McNutt v. Strayhorn, 39 Pa. 269, it was ruled that, though the general rule is that the equities of the creditors are to be worked out through the equities of the partners, yet where the property is parted with by sale severally made, and neither partner has dominion or possession, there is nothing through which the equities of the creditors can work, and therefore there is no case for the application of the rule. See, also, Coover's Appeal, 29 Pa. 9, 70 Am. Dec. 149. Unless, therefore, the conveyances of the partners in this case and the act of fusion were fraudulent, the bank of which the complainant is receiver has no claim upon the property now held by the New Orleans & Carrollton Railroad Company, arising out of the facts that it is a creditor of the partnership, and was such a creditor when the property belonged to the firm.

The bill, it is true, charges that the several transfers of the partners were illegal and fraudulent, without specifying wherein the fraud consisted. The charge seems to be only a legal conclusion from the fact that some of the transfers were made for the payment of the private debts of the assignors. Conceding such to have been the case, it was a fraud upon the other partners, if a fraud at all, rather than upon the joint creditors—a fraud which those partners could waive, and which was subsequently waived by the act of fusion. Besides, that act made provision for some of the debts of the partnership; and it has been ruled that where one of two partners, with the consent of the other, sells and conveys one half of the effects of the firm to a third person, and the other partner afterwards sells and conveys the other half to the same person, such sale and conveyances are not prima facie void as against creditors of the firm, but are prima facie valid against all the world, and can be set aside by the creditors of the firm only by proof that the transactions were fraudulent as against them. Kimball v. Thompson, 13 Metc. (Mass.) 283; Flack et al. v. Charron et al., 29 Md. 311. A similar doctrine is asserted in some of the other cases we have cited. And see Allen v. Valley Co., 21 Conn. 130, 54 Am. Dec. 333. In the present case we find no such proof. We discover nothing to impeach the bona fides of the transaction, by which the property became vested in the railroad company.

Thus far we have considered the case without reference to the provisions of the Louisiana Code, upon which the appellant relies. Article 2823 of the Revised Civil Code is as follows: "The partnership property is liable to the creditors of the partnership in preference to those of the individual partner." We do not perceive that this provision differs materially from the general rule of equity we have stated. It creates no specific lien upon partnership property, which continues after the property has ceased to belong to the partnership. It does not forbid bona fide conversion by the partners of the joint property into

rights in severalty, held by third persons. It relates to partnership property alone, and gives a rule for marshaling such property between creditors. Concede that it gives to joint creditors a privilege while the property belongs to the partnership, there is no subject upon which it can act when the joint ownership of the partners has ceased. Article 3244 of the Revised Civil Code declares that privileges become extinct "by the extinction of the thing subject to the privilege."

What we have said is sufficient for a determination of the case. If it be urged, as was barely intimated during the argument, that the property sought to be followed belongs in equity to the bank, or is clothed with a trust for the bank, because it was purchased with the bank's money, the answer is plain. There is no satisfactory evidence that it was thus purchased. It cannot be identified as the subject to the acquisition of which money belonging to the bank was applied.

The bank has, therefore, no specific claim upon the property, nor is there any trust which a court of equity can enforce; and it was well said by the Circuit Justice that, without some constituted trust or lien, "a creditor has only the right to prosecute his claim in the ordinary courts of law, and have it adjudicated before he can pursue the property of his debtor by a direct proceeding" in equity.

Decree affirmed.

II. By Act of Single Partner.

LAMBERT'S CASE.

(Court of Common Pleas, 1614. Godb. 244.)

Two men were partners in goods: the one of the partners sold unto J. S., at several times, goods to the value of £100, and for the goods at one time bought he paid the money according to the time; afterwards an action was brought by one of the partners for the rest of the money, and the plaintiff declared upon one contract for the whole goods, whereas in truth they were sold upon several contracts made, and the defendant in that case would have waged his law. But the court advised the plaintiff to be nonsuit, and to bring a new action, because that action was not well brought, for it ought to have been a several action upon the several contract. And in this case it was agreed by the court, that the sale of one partner is the sale of them both; and therefore although that one of them selleth the goods or merchandiseth with them, yet the action must be brought in both their names; and in such case the defendant shall not be received to wage his law, that the other partner did not sell the goods unto him, as is supposed in the declaration.

SLOAN v. MOORE.

(Supreme Court of Pennsylvania, 1860. 37 Pa. 217.)

This was an appeal by Mortimer M. Moore from the decision of the common pleas of Erie county appointing a receiver of the assets of M. M. Moore and B. F. Sloan, late partners doing business as Sloan & Moore, and enjoining said Moore from interfering therewith.

The bill, supplemental bill, and answer show that Sloan, the complainant, and Moore, the defendant, were equal copartners in the ownership and publication of the Erie Observer, a weekly newspaper. By the articles of copartnership it was agreed that it should continue until the 1st day of January, 1859. Shortly before its termination differences arose between the partners, and fruitless attempts were made to adjust the business of the firm and arrange the ownership of the property, in view of its approaching close. The property was of such a character that its value would have been greatly impaired by stopping the issue of the newspaper, and yet neither of the parties could carry on the business singly, for each had equal rights, not only in the property, but in the business of the firm. No settlement having been effected, and no arrangements having been made for continuing the publication of the paper and prosecuting the business of the firm, the complainant filed his bill on the 15th of December, 1859, praying for the apppointment of a receiver and for an injunction against the defendant; and a subpœna was issued, returnable on the 23d of December, 1859. With the subpœna a certified copy of the bill was served. On the 29th day of December, 1859, before any further action was taken upon the bill, and two days before the expiration of the partnership by its own limitation, the defendant sold the Erie Observer printing establishment, including the presses, type, tools, fixtures, and good will, and all the property of the firm in the newspaper, to a certain J. J. Lints. A small part of the purchase money was paid in cash, and the defendant took the notes of the purchaser for the remainder, payable at different periods, some of them postponed for 18 months. A supplemental bill was then filed by the complainant, charging the sale so made, and renewing the prayer for a receiver and an injunction. It was on this state of facts that the court granted a special injunction, and subsequently made it perpetual, and appointed a receiver.

Here the partnership was about to close when the original bill was filed, and had actually ceased when the supplemental bill was presented. The partners could not agree as to the disposition of the property. The custody of right belonged to one as much as to the other, and there was a gross breach of duty by the defendant. The attempt by Moore to sell the entire property of the firm, and thus exclude the complainant from any control over it, was utterly unjustifiable, and it imperiously demanded the appointment of a receiver. It was, indeed, ruled in Deckard v. Case, 5 Watts, 22, 30 Am. Dec. 287, that one partner might as-

sign the whole partnership property in trust for the payment of creditors, and the same has been held in some other cases, though it has been also doubted. In most, if not all, of the cases in which this doctrine has been asserted, there were peculiar circumstances. Thus, in Deckard v. Case, the partner who did not join in the assignment had run away. He was, of course, not at hand to be consulted, and, as the assignment was for the liquidation of partnership debts, his assent was presumed. So, in Harrison v. Sterry, 5 Cranch (U. S.) 300, 3 L. Ed. 104, the assignment was only a partial one, and it was made by the only managing partner residing in the United States; the others being resident in England. So, in Anderson v. Tompkins, 1 Brock. (U. S.) 456, Fed. Cas. No. 365, the partner who did not join in the assignment had left for Europe, and the instrument was made by the partner who remained when the firm had failed in business. But none of the cases decided that a partner can make a general assignment in trust for the benefit of creditors against the consent, or without the concurrence of his copartner; the latter being present, and capable of acting in the matter. The contrary was directly decided in Hays v. Heyer and Deming v. Colt, 3 Sandf. (N. Y.) 284, 296. And, indeed, this must be so; for, while the contract of partnership constitutes each of its members an agent for the others, it is only for the purpose of carrying on the partnership, not for destroying it. Denuding the firm of all its property is a thing not contemplated, and consequently no agency for such a purpose was intended to be created. When, therefore, one partner is at hand, and might assent, but does not, it is quite unreasonable to presume that he has empowered his copartner to do an act destructive of the purposes for which the firm was established.

Still less can an authority be admitted in one partner to sell the entire property of the firm, when the object of the firm was not trade, buying, and selling, but a business to which the continued ownership of the property sold is indispensable. An assignment is for the purpose of paying the debts, but a sale principally for division, as was this case, has not even that apology. Such a power in one of two copartners is asserted by no adjudicated case. It is directly in conflict with the purposes of the partnership. Instead of a presumption of agency to make such a sale, the presumptions are all the other way. It is not denied that it is within the scope of partnership authority for one partner to sell and dispose of all the partnership goods in the orderly and regular course of the business; but selling the newspaper, with its good will, presses, type, etc., cannot be said to have been in the regular course of the business of this firm.

It is clear, therefore, that Moore had no power arising out of the contract of copartnership to make sale to Lints of the entire property of the firm. The case shows in him no other authority. That the complainant assented to the sale is not pretended, nor, indeed, can it be. It was made, as already seen, while the complainant was prosecuting his bill in court for a receiver and for an injunction against interfer-

ence with the property. The supplemental bill charges that it was made without the knowledge or consent of Sloan, and the defendant's answer, while denying that it was made without that knowledge or consent, adds that he was informed and believed that the complainant did not know he was selling the printing establishment. Nothing more than knowledge is asserted. The defendant carefully avoids averring that the complainant assented to the sale. He denies that it is true that complainant neither knew nor consented to the sale, and follows this denial by an averment that he did know of it. This is a negative pregnant.

The sum of the case is this: One partner in a firm, not a trading firm, while the partnership is existing, finding himself unable to agree with his copartner respecting the disposition of the joint effects, makes a credit sale of the whole to a third person, without the assent of the other partner, though that other was at hand and might have been consulted. This, too, is done while judicial proceedings are pending to accomplish a settlement of the difficulties between the partners. Even if such a sale were legal, it evinces a total disregard of the rights of the nonconcurring partner, and is what has sometimes been called by a chancellor unrighteous conduct towards him. This was amply sufficient to warrant the appointment of a receiver.

The reasons for the appointment of a receiver apply with equal force to justify the injunction. Indeed, the decree making the latter perpetual was a necessary consequence of putting the partnership property into the hands of the receiver.

The decree of the court of common pleas is affirmed.

DECKARD v. CASE.

(Supreme Court of Pennsylvania, 1836. 5 Watts, 22, 30 Am. Dec. 287.)

Error to the common pleas of Perry county, in an action of trespass on the case against the defendant Deckard, for levying an execution on certain carriages, wagons, etc. It appeared that the property had formerly belonged to Lowe & Mead, partners in the wagon-making business; that the plaintiffs and others, having judgments against the firm, caused a levy to be made on said property by the sheriff, who took it into his possession; that, Mead having absconded, Lowe agreed with certain of the creditors to transfer all the stock in trade of the firm to the plaintiffs, in consideration of their assuming to pay certain debts of the firm, including those for which the levy had been made; that he made such transfer accordingly, by an assignment under seal, and the sheriff thereupon delivered the property to the plaintiffs, who rented the shop formerly occupied by the partners, and took the goods back there, and began to carry on the same business, employing Lowe as one of their workmen; that about 14 months afterwards another

creditor of Lowe & Mead, having obtained execution against them, placed it in the defendant's hands, and he, having been indemnified by the creditor, levied upon the goods. The court below instructed the jury that the fact that the assignment included the whole stock in trade of the partnership, and was under seal, and executed by only one of the partners, did not render it invalid, but that, if the jury should find that the employment of Lowe was a part of the consideration of the transfer, it was fraudulent and void. Verdict and judgment for the plaintiffs, which the defendant brought error to reverse.

ROGERS, J. It is a general principle of the law of partnership that the partners are bound by what is done by each other in the course of the partnership business. They are considered as virtually present at and sanctioning the contracts they singly enter into in the course of trade; and each is vested with authority to act at the same time as principal and as the authorized agent of his copartners. Each partner reposes confidence in the other, and by the act of entering into the partnership constitutes him his general agent as to all the partnership business. These principles are established for the benefit of the partners themselves; for it would be a great impediment to commercial dealings if, in the ordinary transactions of trade, it were necessary that the actual consent of each partner should be obtained, or that it should be required that the transaction should be really for the benefit of the firm. When, therefore, the act of one has the appearance of being on behalf of the firm, it is considered as the act of all. Among the powers more ordinarily exercised by partners is the jus disponendi, or the power which each partner individually has of disposing of the joint stock or merchandise. But it is contended that these powers are subject to certain limitations; and on the authority of Justice Washington, in Pearpoint & Lord v. Graham, 4 Wash. C. C. (U. S.) 234, Fed. Cas. No. 10,877, it is said to admit of serious doubt whether one partner can, without the consent of his associates, assign the whole of the partnership effects (otherwise than in the course of the trade in which the firm is engaged) in such a manner as to terminate the partnership. Justice Washington inclines to take a distinction between a voluntary act of a partner, and those cases where, by act of God or by the operation of the law, the partnership is dissolved, as by death or bankruptcy of a partner.

But why should the disposal of the whole stock in trade necessarily dissolve the partnership? The transaction may be for the benefit of the concern, and may increase, rather than diminish, the ability of the firm to continue their business. It is admitted he can sell part without the actual consent of his associates, and the policy of limiting that right is not very apparent, where the transaction is concluded in good faith; still less in a case like the present, where the arrangement is most clearly for the benefit of the firm. For, had the property been sold by the sheriff in its unfinished state, it would have been attended with the sacrifice of the interests of all the parties. Mead, aware that

the property had been taken in execution, abandoned all care of it. From necessity, then, the other partner should have the power of disposal in payment of the debts of the firm. It cannot, with any propriety, be considered as a voluntary act of disposition; but some arrangement was required to relieve the property from the custody of the sheriff. But is the power so limited as that one partner cannot dispose of the whole of the partnership effects? In Fox v. Hanbury, Cowp. 445, Lord Mansfield held that each partner has a power singly to dispose of the whole of the partnership effects. The authority is implied from the nature of the business. Justice Brainard, in Mills v. Barber, 4 Day (Conn.) 430, expresses the opinion that one partner has the absolute power of disposing of the whole. And in Harrison v. Sterry et al., 5 Cranch (U. S.) 289, 3 L. Ed. 104, it is held that one partner may, in the partnership name, assign the partnership effects and credits in trust for creditors of the firm. The case of Dickinson v. Legare, 1 Desaus. Ch. 537, would seem to have been put on the ground of fraud, and certainly the transaction must be free from every taint of fraud; but, when the assignment is bona fide, I cannot doubt the power of one partner to transfer the whole, as well as a part, of the partnership effects. Nor do I think it can make any difference, in passing the interests of the firm, when the property has been delivered, whether the instrument of transfer be under seal or not. The assignment transfers the whole right of the firm, and not merely the right of Lowe. It purports to assign the whole interest, and contains warranty against all persons whatsoever.

There is no ground to say that there was fraud in the contract. The fact of fraud was left by the court to the jury, and they have found that the contract was bona fide. * * *

The levy was made upon all the property of the defendants. After the levy it was removed to an adjoining warehouse and held by the sheriff in custody for several days, and when so held the contract was made for a valuable consideration. The shop to which the property was retransferred was rented by the vendees. It was under their superintendence and care. They hired the workmen, purchased the materials, and continued the direction of the concern for 14 or 15 months.

There is nothing in all this either fraudulent in fact or forbidden by the policy of the law. Nor will the fact that the plaintiff employed Lowe as a journeyman affect the transaction, unless his employment was a part of the consideration of the contract.

Judgment affirmed.[1]

[1] "It is to be noted that the question arises in this case between the creditors of an insolvent firm, and not between the purchasing creditor and a member of the firm not consenting to the transfer of the property. If the question arose between the purchasing creditor and a nonconsenting partner, a very different question might be presented. The agency which one partner holds for his copartner is revocable, and his implied authority to dispose of the partnership assets is subject to revocation. It is undoubtedly the law that

SHATTUCK v. CHANDLER.

(Supreme Court of Kansas, 1889. 40 Kan. 516, 20 Pac. 225, 10 Am. St. Rep. 227.)

Action upon promissory notes by J. E. Chandler, as assignee of the firm of Pierpont & Tuttle, against James A. Shattuck. Judgment for plaintiff, and defendant brings error.

CLOGSTON, C. This was an action upon a large number of promissory notes made payable to Pierpont & Tuttle, and guarantied by the firm of Shattuck & Bowers in these words: "For value received, I hereby guaranty the payment of this note according to the terms thereof, waiving demand, notice, and protest." The evidence shows that Pierpont & Tuttle were a manufacturing firm, located at Bushnell, Ill., and that Shattuck & Bowers resided in Phillips county, Kan., and were engaged in the sale of agricultural implements. Certain agricultural implements furnished by Pierpont & Tuttle were sold by Shattuck & Bowers, and the notes sued on were taken in payment

if one partner dissents, or forbids the transfer of property of the firm before it is complete, and notice thereof be given to the purchaser, the sale will not be binding upon the dissenting partner. The member of the firm would cease to act as the agent of the other member in respect of such transaction. In Halstead v. Shepard, 23 Ala. 558, it was held that, where 'one partner undertakes to dispose of the partnership effects to the injury of the other partner, equity will interpose to grant relief,' and, 'if the purchasers of such effects take them with notice of such fraudulent intent of the partner making the sale, they will be considered as parties to the fraud, and liable in equity to the partner to refund.'" Per Shope, J., in Hanchett v. Gardner et al., 138 Ill. 571, 28 N. E. 788 (1891).

In Tapley v. Butterfield, 1 Metc. (Mass.) 515, 35 Am. Dec. 374 (1840), upholding the validity of a chattel mortgage under seal, executed in the name of the partnership by one partner, covering the whole property of the firm, it is said: "It is within the scope of partnership authority for one partner to sell and dispose of all of the partnership goods in the orderly and regular course of business. It is also within the scope of partnership authority to pay the debts of the firm, and to apply the assets of the firm for that purpose. He, being authorized to sell the goods to raise money to pay their debts, may apply the goods directly to the payment of the debts; and according to the exigencies of the occasion he may pledge the partnership goods to raise money to pay the debts of the firm. To this extent we think each partner has a disposing power over the partnership stock, arising necessarily from the nature of that relation. * * * To what extent one partner can bind another in the disposition of the entire property of the concern is a question of power, arising out of the relation of partnership, and does not, we think, depend upon the form or manner in which it is exercised. Lands held by partners are considered as lands held by tenants in common; and as one tenant in common cannot pass any estate of his co-tenant, and as land cannot pass without deed, it follows that one partner cannot convey away the real estate of the firm without special authority. But, considering that the authority of selling and pledging the personal property is within the scope of partnership power, and may be done by either partner, and considering that it may be done without deed, the court are of opinion that such a mortgage, made by one partner in the absence of the other, although unnecessarily made by deed, was binding upon the property, and constituted a valid lien upon the property, which the plaintiff may avail himself of. Anderson v. Tompkins, 1 Brock. (U. S.) 456, Fed. Cas. No. 365; Deckard v. Case, 5 Watts, 22, 30 Am. Dec. 287. * * *"

therefor; said notes being made payable to Pierpont & Tuttle, and before delivery to them were guarantied, as above stated. In answer to the petition the defendant alleged, among other defenses, that the plaintiff was not the assignee of Pierpont & Tuttle, and that he had no right or authority to bring the action; and also alleged that Pierpont & Tuttle had failed to collect the notes when the same were due and payable; that the makers of the notes were solvent at that time, and afterwards became insolvent, and nonresidents of Kansas. The plaintiffs offered in evidence the notes sued on, and the deed of assignment made in Illinois by Tuttle in the firm name of Pierpont & Tuttle; also a deed of assignment by Tuttle as the surviving partner of Pierpont & Tuttle. Said last deed of assignment, in addition to a general assignment of all the property of the firm of Pierpont & Tuttle, ratified the first deed of assignment, and all the doings and proceedings had thereunder by the plaintiff as such assignee. Both of these assignments were objected to, and the objection overruled, and were admitted in evidence.

The first deed was objected to upon the ground that one of several partners has no authority, without the consent of the other partners, to make a general assignment of the partnership property. The plaintiff contends that the deed of assignment is prima facie good, and it devolved upon the defendant to show that Pierpont did not consent to the assignment, and that, unless it was at least shown that he objected to the assignment, the assignment must be held good. In this we do not agree with the plaintiff. Where an assignment is made by one partner, his right to make that assignment depends upon the consent of his copartner; and to give him authority to make it, he must, in addition, show that his partner consented thereto, or show such a state of facts from which the court could presume assent; or show that the partner was absent from the country, and that therefore his assent could not be procured; or some other state of facts that would show to the court that the partner making the assignment had authority, either by reason of the articles of partnership, or by the fact of his being managing agent of the partnership, or some such fact from which the court could say that the assignment was authorized by the partnership. No such proof was made in this case, and we think, in the absence of such proof, the assignment offered in evidence was absolutely void. See Burrill, Assignm. (5th Ed.) §§ 68-88; Loeb v. Pierpoint, 58 Iowa, 469, 12 N. W. 544, 43 Am. Rep. 122; Lowenstein v. Flauraud, 82 N. Y. 494; Haggerty v. Granger, 15 How. Prac. (N. Y.) 243; Dunklin v. Kimball, 50 Ala. 251; Sloan v. Moore, 37 Pa. 217; Graves v. Hall, 32 Tex. 665; Story, Partn. § 101; Pars. Partn. 166. This doctrine is now almost universally acknowledged to be the rule.

The second assignment offered in evidence presents a more difficult question. In many of the states the doctrine is held that a surviving partner cannot make a general assignment, and in those states the theory upon which the decisions were rendered is that at the death of one

partner the surviving partner becomes trustee of the partnership estate, and that he has no power to transfer the trust so created to another trustee. This seems to be the doctrine held in New York. See Nelson v. Sutherland, 36 Hun, 327; Loeschigk v. Hatfield, 51 N. Y. 660; Cushman v. Addison, 52 N. Y. 628; also Tiemann v. Molliter, 71 Mo. 512; Vosper v. Kramer, 31 N. J. Eq. 420. On the other hand, it has been held by some of the states that the surviving partner may make a general assignment of a partnership; and to this effect are numerous decisions, among which is Emerson v. Senter, 118 U. S. 3, 6 Sup. Ct. 981, 30 L. Ed. 49, in which case the court held that the surviving partner could make a general assignment. The court said: "The right to do so grows out of his duty, from his relations to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay." This seems to be the settled doctrine of the Supreme Court of the United States, and should be followed, unless there is some statute making a different rule. This assignment was made under the laws of Illinois, and should be interpreted thereunder; but in this case no statute of Illinois was offered disclosing what provisions had been made in that state by statute for the winding up of partnership business, and, in the absence of any showing of this kind, we must presume that the statute of Illinois is like that of Kansas.

This brings up the question, is there any statute in Kansas that conflicts with the rule laid down by the Supreme Court of the United States in the last case cited? Article 2, c. 37, Comp. Laws 1885, provides for the winding up and settlement of partnership estates. This provides for the appraisement of partnership property, and that the property shall remain in the possession of the surviving partner, and, if he sees fit to continue its management, and the disposing of the partnership assets, and the payment of the partnership debts, he may do so upon condition that he give a bond for the faithful performance of the duties imposed; and the power is given the probate court to cite him, after the giving of such bond, to an accounting, and to adjudicate upon such accounts as in the case of an ordinary administrator, and for an action upon the bond in case of his failure to faithfully administer the partnership estate; and upon his refusal to give the bond and take charge of the partnership property, it becomes the duty of the administrator of the deceased partner's estate to assume the management of the same, and to settle it up. By this statute ample provisions are made for the closing up of a partnership estate, either by the surviving partner or by the administrator of the deceased partner's estate. We think that the Legislature by this provision intended to provide a trustee to close up the partnership upon the death of a member of the firm, and that the statute creates a trust in the surviving partner which he has no power to transfer to another, except as it is transferred by his refusal to administer upon the partnership estate, in which event it is

transferred by operation of law to the administrator of the deceased partner's estate. * * *

If the surviving partner under our statutes may transfer his trust to an assignee, then the assignee would close up the entire partnership business in the court having jurisdiction of the assignment and estate thereunder, and would be entirely free from the jurisdiction of the probate court, and the statute above cited would be without any force or effect. Did the Legislature intend that this statute might be regarded or not, at the pleasure of the surviving partner? We think not. This means of winding up a partnership business has been prescribed by the Legislature, and, in the absence of any proof of the statutes of Illinois to the contrary, we must presume that this is the manner of closing up partnership estates in that state. We therefore think the court erred in permitting the second assignment to be given in evidence, as it gave the plaintiff no authority or right to commence the action. * * *

It is therefore recommended that the judgment of the court below be reversed, and the cause remanded for a new trial.

ROVELSKY v. BROWN et al.

(Supreme Court of Alabama, April 14, 1891. 92 Ala. 522, 9 South. 182, 25 Am. St. Rep. 83.)

Action for specific performance by D. Rovelsky against B. S. Brown and A. J. Smith, partners as Brown & Smith. The chancellor granted the relief of complainant as to one-half interest owned by Brown, but refused to grant the relief as to the other half interest owned by Smith, and decreed that Smith was entitled to his half interest in the property sold and that all the property should be held subject to the debts of the partnership. Complainant appeals.

WALKER, J. B. S. Brown and A. J. Smith were partners, doing business in the town of the Ozark, in this state, under the firm name of Brown & Smith. On the 27th day of September, 1889, said Brown, in the name of the firm, sold to Rovelsky a house and lot in the town of Ozark at the price of $700, received $500 thereof in cash, and signed the firm name to a bond for title purporting to bind A. J. Smith and B. S. Brown under the firm name of Brown & Smith. Rovelsky was put in possession of the property by Brown, and thereafter tendered the balance due on his purchase, and demanded of the partners a conveyance of title to the property. Smith refused to join in the conveyance. Thereupon Rovelsky filed his bill for the specific enforcement of the contract evidenced by the bond for title. Brown interposed no defense. Smith defended on the ground that the property in question was owned by himself and Brown as joint tenants or tenants in common, and that the sale by Brown was made without his knowledge or consent, and was repudiated by him, because, in respect to his

right and title to his undivided half interest in said real estate, he was in no way bound by the acts of said Brown. Smith, by the terms of his answer and by the statements in his deposition, assumed the position that the land in question should not be treated as partnership property, but as any other land held by a tenancy in common. The bill avers that Brown & Smith were engaged in buying and selling real estate for speculation and profit, and that they engaged in that business as partners; that they bought and sold real estate as partners, under the firm name of Brown & Smith. These averments are sustained by the testimony of Brown, of the complainant, and of Barnes, all to the effect that Brown and Smith were partners in the real estate business, and were engaged in buying and selling lots in and around Ozark; that they treated and rented their property there as firm property, and, prior to the sale now sought to be enforced, each of the partners, in the name of the firm, was trying to make sale of the lot in question for the purpose of paying the debts of the firm. Brown stated that, prior to the purchase of the lot, he and Smith (the latter did not reside at Ozark) had formed a partnership for the purpose of buying and selling real estate in the town of Ozark, and that it was agreed that Brown should make the purchases; that he did make the purchases, and Smith afterwards paid his part of the purchase money to Brown, and the property was regarded as having been bought with partnership money; and that both members of the firm had the right to bargain for the sale of any of the lots belonging to the firm. * * *

We are satisfied from the evidence that the lot was bought by Brown & Smith in the course of a general dealing engaged in by them in the business of buying and selling real estate, and that it, like other lots owned by them, was treated and regarded by them, and is to be treated and regarded by the court, as partnership property. So treating it, will the contract made in the name of the firm by Brown alone be specifically enforced against Smith?

The doctrine is familiar, and is illustrated by many reported cases, that when partnership funds have been used in the acquisition of real estate, whether the title be taken in the name of one partner, or in the names of all, so as to make them in law tenants in common, such property will for certain purposes be treated in courts of equity as personalty. Powers v. Robinson, 90 Ala. 225, 8 South. 10, and authorities there cited. This doctrine has usually been invoked for the purpose of enforcing the payment of partnership debts, or to secure a proper division of the assets on a settlement of the partnership affairs; and sometimes the courts, having in view only these familiar applications of the rule, have spoken of it existing for the two purposes above mentioned. Such statements, on their face, may suggest a doubt as to whether the doctrine can be invoked for any other purpose. In an ordinary trading or commercial partnership, the usual dealings of the concern in the course of its business are with money or other personal property. Real estate does not figure in the regular dealings of

such a partnership; but it often happens that real estate is acquired in the collection of debts, or the funds of the firm may find their way into real estate in other modes. Still real estate does not become the subject-matter of the regular business dealings of the firm. It is disposed of, or, if it remains on hand, that part of the partnership funds which has been used in its acquisition is thereby practically withdrawn from the business. The real estate is not, in such cases, used for partnership purposes, except by selling it, and returning the proceeds to the business, there to be used in trade, in paying debts, or in a distribution on a settlement of the partnership affairs. If not so voluntarily applied by the partners themselves, courts of equity are not likely to be appealed to in reference to such real estate, as affected by the partnership relation, except to reach it as a depository or hiding place of partnership funds for the purpose of enforcing the payment of debts or to secure an equalization in division among partners. The fact that, in most of the reported cases, the equitable jurisdiction has been invoked only for one or the other or both of these two special purposes is an explanation of the habit of speaking of the rule as existing for those purposes, without mentioning other purposes which, on consideration, may be found to be equally within the reason of the rule. There are manifest reasons for the existence of this equitable rule of treating partnership real estate as personal property. A general partnership is a scheme of co-ordinate contribution, effort, and action by each for all. The property and resources contributed by the several members constitute a fund specially appropriated for use in carrying on the partnership business, for the satisfaction of partnership obligations, and for a ratable division of what may be left among the partners. None of these special purposes could be effectually carried out as to real estate, if the incidents of the legal ownership of that kind of property are recognized in the partnership dealings. The powers of the several general partners in the acquisition, management, control and disposition of the partnership property in the course of business, would be impossible of adequate exercise if hampered by the restrictions which at law embarrass the ownership and alienation of real estate. The incidents of dower, heirship, etc., practically preclude, so far as real estate is concerned, a recognition at law of that species of title which the partnership and the several members thereof have in the firm property; for each has the power of absolute disposition within the scope of the business, and, in the case of the death of a member, the survivor or survivors are vested with an exclusive title and right of disposition for partnership purposes. It is plain, without further illustration, that, in dealing with partnership real estate for partnership purposes, it is impracticable to recognize the incidents of its legal ownership. And it is equally plain, without any illustration at all, that it would be grossly unjust, both in respect to the relations of the partners with each other, and as regards the partnership dealings with others, to allow the investment of partnership

funds in real estate to limit or to enlarge the rights and powers of the several partners as to the firm property, or to cut off or restrict the appropriation of the partnership property to the purpose above mentioned, to which it has been specially set aside and devoted. Such inequitable results are obviated by treating, so far as necessary to accomplish the purposes of the partnership, such real estate as personal property. And why should not such real estate be treated as personal property when it is the subject-matter of the ordinary business of the partnership, as well as when it is sought to be reached to enforce the payment of debts, or to effect a settlement of the partnership affairs? It is a fact that the buying and selling of real estate is a regular business, engaged in throughout the country. Many partnerships are in existence devoted exclusively to the transaction of this kind of business. Real estate is the subject-matter of their trading operations. They deal in it as a commodity. It is their stock in trade. The obligations they assume directly affect and involve the title to that character of property. If a debt contracted in a transaction having no connection with real estate by a member of an ordinary commercial firm, acting within the scope of the business, may be enforced against land, merely because partnership funds have been used in its acquisition, a fortiori the obligation one member of a real estate partnership undertakes in the regular course of trade, in reference to the kind of property which is the special subject-matter of their business, should be effectually enforceable against all the partners, and should reach and bind the property dealt in. If the several partners in a firm, engaged in the business of buying and selling real estate, cannot bind the firm by purchases or sales of such property, made in the regular course of business, then they are incapable of exercising the essential rights and powers of general partners, and their association is not really a partnership at all, but a several agency, the acts of each member being subject to ratification or repudiation by the other members, or by their wives, or, if they should die, by their widows, heirs, or devisees. In short, we are unable to discover any satisfactory reason for denying to a court of equity the power to treat real estate as personalty in order to make binding partnership obligations in reference to the particular subject-matter of the regular dealings of the firm, when that rule sought to be invoked to this end is readily applied to enforce the payment of ordinary debts, or to secure a partnership division, which, as compared with the immediate and primary aim of carrying on the regular business of the concern, are the secondary and ultimate purposes to which the partnership property has been pledged or devoted. And authorities are not wanting to support the conclusion that the rule is not confined in its application by any such unreasonable distinction. In Lang's Heirs v. Waring, 17 Ala. 145, it was said: "So far as the partners and their creditors are concerned, real estate belonging to the partnership is in equity treated as mere personalty; and so it will be deemed as to all other intents, if the partners have by agreement

or otherwise impressed upon it that character." In a suit to recover commissions for finding a purchaser of real estate, brought by a man who has been employed by one member of a firm to sell the partnership land, it was said: "There is no doubt that a copartnership may exist in the purchase and sale of real property, equally as in any other lawful business. Nor is there any doubt that each member of such copartnership possesses full authority to contract for the sale or other disposition of its entire property, though, for technical reasons, the legal title vested in all the copartners can only be transferred by their joint act." Thompson v. Bowman, 6 Wall. 316. One member of a partnership engaged in the business of buying and selling real estate, fraudulently, and without the knowledge of his copartner, represented to a purchaser that the partnership land which was the subject of the sale was oil-producing. In an action for damages for the fraud and deceit, it was held that both partners were liable. In the course of the opinion the court says: "When the partnership business is to deal in real estate, one partner has ample power, as general agent of the firm, to enter into an executory contract for the sale of real estate." Chester v. Dickerson, 54 N. Y. 1, 13 Am. Rep. 550. "When real estate is brought into the partnership business, it is treated, in equity, as personal estate, and a lease of it by one partner is as much a partnership transaction as a sale of partnership goods by him would be." Moderwell v. Mullison, 21 Pa. 257. When land is purchased to be dealt in as a commodity, this would seem to be, for the purposes of such dealing, an out and out conversion of it into personalty, and each partner can bind the firm by contracts for its disposition. Ludlow v. Cooper, 4 Ohio St. 1; Olcott v. Wing, 4 McLean (U. S.) 15, Fed. Cas. No. 10,481; Pugh v. Currie, 5 Ala. 446; Frost v. Wolf, 77 Tex. 455, 14 S. W. 440, 19 Am. St. Rep. 761; 1 Bates, Partn. §§ 298, 299. Our conclusion is that partnership real estate is, in equity and for partnership purposes, to be treated as personalty; and that one member of a partnership, engaged in the business of buying and selling real estate, can bind the firm by contract in the firm name for the sale of partnership land, and that such contract should be specifically enforced against all the partners. * * *

The decree of the chancery court is reversed, and a decree will be here rendered for the specific enforcement of the contract of sale; appellee Smith to pay the costs in this court and in the chancery court.

JANNEY v. SPRINGER et al.

(Supreme Court of Iowa, 1889. 78 Iowa, 617, 43 N. W. 461, 16 Am. St. Rep. 460.)

This is an action at law to recover upon an account for ground feed sold to the defendants. There was a trial by jury, and a verdict and judgment for the plaintiff. Defendants appeal.

ROTHROCK, J. It appears from the evidence that at the time the account accrued A. A. Paine & Co., a partnership, were the keepers of a feed store, and that the individual members of the partnership were A. A. Paine and J. M. Janney, plaintiff in this action. W. W. Springer and C. F. Willard were at the same time engaged in the business of importing and selling high-bred horses from France under the partnership style of Springer & Willard. A. A. Paine & Co. furnished the ground feed the value of which is in controversy in this action, which feed was consumed by the said horses. Some time after the account accrued the firm of A. A. Paine & Co. was dissolved, and at the dissolution of the firm the ground feed account was assigned to Janney in the settlement of the partnership. He brought this action against the firm of Springer & Willard, and against Springer as an individual member of the firm. The defendants claimed that Willard bought the feed of A. A. Paine, and paid him therefor. The real facts relied upon as a defense were that A. A. Paine was indebted to Willard upon a promissory note, and that Willard bought the feed of Paine under the agreement that the price of the same was to be applied on the note and in payment thereof. After both parties had introduced their evidence the plaintiff filed a motion for an order directing the jury to return a verdict for the plaintiff. The motion was sustained upon the ground that an agreement between Willard and Paine that Willard should purchase the feed and pay for the same by the discharge of Paine's individual indebtedness was void as to Janney, the other member of Paine & Co., unless Janney in some way assented to or ratified the transaction. We do not understand that this proposition is controverted by counsel for appellants. But it is contended in behalf of appellants that the question as to whether there was such a partnership as A. A. Paine & Co. should have been submitted to the jury. We do not think this position can be sustained. The existence of the firm was shown by the testimony of these witnesses, and there was no evidence to the contrary. It is said there was no firm sign erected at the place of business of the partnership, and that defendants had no knowledge of the existence of the firm. This want of knowledge and omission to use a sign was in no sense conflicting evidence upon the question of a partnership in fact. It having been established beyond question that the feed was partnership property, it was incumbent on the defendants to show that Janney in some way assented to the alleged agreement to pay the individual debt of Paine in partnership property, or that he (Janney) in some way ratified the act after it was done. Thomas v. Stetson, 62 Iowa, 537, 17 N. W. 751, 49 Am. Rep. 148. There was no evidence of such assent or ratification.

The only other question necessary to be noticed in the case is the claim of counsel for appellants that, as they had no knowledge that Janney was in partnership with Paine, they had the right to deal with Paine as though he were the sole owner of the feed. It may be this position would be sound if there were any evidence that Janney was

a dormant or silent partner. But there is no such evidence. The partnership existed for some three years. Janney was personally and publicly engaged in the business, and his daughter was bookkeeper of the partnership. There was no evidence of any act of concealment of the partnership. It is true that for part of the time there was no partnership sign upon the building. But there was no sign of any kind, and therefore no effort to mislead any one as to the true relation of the parties. We think that under the facts of the case the question of knowledge as to the partnership is immaterial. In our opinion the court rightfully directed a verdict for the plaintiff.

Affirmed.

HARTLEY v. WHITE.

(Supreme Court of Pennsylvania, 1880. 94 Pa. 31.)

Action by Norman White against M. J. Decker and Andrew Halstead, copartners, and Silas Hartley as garnishee. The garnishee pleaded "nulla bona." At the trial a special verdict was found showing funds in the hands of the garnishee, and a judgment was entered on the verdict charging the garnishee. The garnishee brings the case up on writ of error.

Mercur, J. The plaintiff in error was served as garnishee of Decker & Halstead, copartners. The jury found that, in fraud of the creditors of the firm and without the knowledge or consent of Decker, except as to one note (shown by the evidence to be about $10), Halstead assigned and transferred judgments and notes, the property of the firm, amounting to about $2,000, to the garnishee; that the transfer of this property was fraudulent, and intended by Halstead and the garnishee to be in payment of Halstead's private debts, and to prevent the same from being used and applied in the payment of the firm debts of Decker & Halstead; that the firm was at the time largely in debt, and soon after became insolvent. They further found that out of the claims thus assigned to the garnishee he had collected a specific sum in cash, and that he had surrendered to the makers notes, and taken new ones therefor, for a sum certain, and of sufficient value, added to the cash received, to exceed by several hundred dollars the sum due to the attaching creditor, or for which judgment was entered against the garnishee.

It is well settled that one partner cannot make a valid transfer of firm property, in payment of his individual debt, without the consent of his copartner. Todd v. Lorah, 75 Pa. 155. Such act is a fraud on his copartner, and the right of property in the firm does not pass to the individual creditor. The present case goes still further. Not only was the attempted sale a fraud on the copartner, but it was intended and operated as a fraud on the creditors of the firm. It is, then, clear under these facts the purchaser cannot hold the property against

the creditors intended to be defrauded. He has no reason to complain of the amount for which judgment was entered against him. It is for a sum less than he has realized out of the property.

It is further objected that the form of the judgment was wrong. This, however, is not a fatal error. The form of the judgment can be amended. It is now done by striking out those references, so that it shall stand, judgment in favor of plaintiff below and against said garnishee for $1,250.20 and costs, to be levied on the goods and effects of Decker & Halstead in his hands, or, in case he fails or refuses to produce such goods and effects sufficient to satisfy the execution, then to be levied against him as his own proper debt. Thus amended, the judgment is affirmed.

BRYANT & STRAW v. CLIFFORD.

(Supreme Court of Vermont, 1854. 27 Vt. 664.)

Action by Bryant & Straw, partners, against Clifford, to recover for work done by them as partners for Clifford. The defendant contracted for the work with Bryant, who acted on behalf of the firm. The existence of the firm was not generally known, and was not known to the defendant at the time of making or during the performance of the contract, which he supposed to have been made with Bryant alone. At the time of entering into the contract Bryant was indebted to the defendant, which indebtedness defendant expected to use in payment of the work done under the contract. The defendant pleaded as a set-off his claim against Bryant. This was disallowed, and judgment given for plaintiffs in the trial court. Defendant alleged exceptions.

BENNET, J. The more important question is: Can the defendant use his account against Bryant as a defense to this action brought by Bryant & Straw? Though, at he time the contract was entered into between Bryant and the defendant, Bryant & Straw were partners, yet this was not known at the time to the defendant, and he supposed he was contracting with Bryant alone, and during the performance of the work he supposed Bryant was alone interested, and had no knowledge of a partnership; and it is found that the defendant was induced to enter into the contract with Bryant because he owed him a balance on book. Bryant ostensibly acted for himself. Nothing was said about his having a partner, nor was it generally known that he had one. Though Straw was present when the contract was made, talked about the work, and made some estimates, and eventually assisted in doing the work, yet this was consistent with his being a journeyman to Bryant, in which capacity he had served him for about one year before.

This was no notice of the existence of the partnership to the defendant, nor enough to put him on inquiry. Though an action may, on such state of facts, be brought by the partnership, yet the court will

see that it is not done to the prejudice of the defendant, and he will be allowed the same defense, whether by set-off or otherwise, that he might have had if sued by Bryant alone. See Hilliker v. Loop, 5 Vt. 121, 26 Am. Dec. 286, and cases there cited. And the set-off need not have arisen, in this case, after the contract was made with Bryant. In the case of Lime Rock Bank v. Plimpton et al., 17 Pick. (Mass.) 159, 28 Am. Dec. 286, it was held that in a suit by the principal the defendant could not be defeated of a legal set-off against the agent who loaned the money. The defendant was allowed to detain to the amount of his claim against the agent. As in the case at bar the defendant was induced to make the contract with Bryant on account of his claim against him, it would be eminently unjust to deprive him of his defense by reason of this action being in the name of Bryant & Straw, when Straw must be regarded in the light of a secret partner when the contract was made with Bryant and the services rendered.

The judgment of the county court is reversed, and judgment rendered on the report for the defendant to recover his costs.

III. Successive Transfers of Each Partner's Interest.

DONER et al. v. STAUFFER et al.

(Supreme Court of Pennsylvania, 1829. 1 Pen. & W. 198, 21 Am. Dec. 370.)

This was a feigned issue, directed by the court and joined between the defendants in error, who were the plaintiffs below (and for whom the verdict passed), and the plaintiffs in error, who were the defendants below.

It appeared from the evidence in the cause that Daniel Howry and Benjamin B. Eshelman entered into partnership in a manufacturing establishment, under the firm of Howry & Eshelman. They became considerably indebted. Judgments were entered and executions were issued against each of them. Abraham Doner, Samuel Herr, John Howry, and Samuel Howry had severally judgments against Daniel Howry, on each of which an execution issued against him and was levied on the 9th of August, 1825, on the personal property of Daniel Howry and Benjamin B. Eshelman, as partners in trade.

John Stauffer, Christian Breckbill, and Jacob Eshelman had severally obtained judgments against B. B. Eshelman, on each of which judgments an execution was issued against him and levied on the 11th day of August, 1825, on Benjamin B. Eshelman's share of the personal property of Benjamin B. Eshelman and Daniel Howry, as partners in trade. By virtue of these and other executions the personal property of the firm was sold for the sum of $5,070.39, which, after pay-

ment of the costs, left a balance of $4,779. This balance was paid into court for distribution.

On a rule obtained by the counsel of Stauffer, Breckbill, and Eshelman to show cause why the one-half of the proceeds of the sale of the firm property should not be applied to the satisfaction of their executions against B. B. Eshelman, the court decided that the execution creditors of Benjamin B. Eshelman had a legal right to his share of an interest in the partnership effects of the firm of Howry & Eshelman as it stood on the 11th of August, 1825, when the executions were levied, and directed this issue to try what that share or interest was.

The plaintiffs claimed a moiety or half part of the $4,779 as their share.

The plaintiffs having closed their evidence, the defendants, in support of the issue taken in the cause, offered to prove that the firm of Howry & Eshelman was entirely insolvent on the 11th of August, 1825; that the debts and claims against the said firm existing on the said 11th of August, 1825, which were then unpaid, greatly exceeded the whole property of the said firm; that Benjamin B. Eshelman on the said day had no interest whatever in the said firm, and that Daniel Howry, the other partner, is greatly interested in the application of the funds of the said firm to the payment of the debts of the said firm, as he is answerable individually and as a partner for the whole of the said debts—which offer being objected to, the court overruled the same, and delivered the following opinion, to wit: "I am satisfied that the authorities cited settle the law as it applies to the cases decided; that is to say, to cases where there are separate executions against one partner levied on the partnership effects. But this is a case where the whole partnership effects are swept away by separate executions against each partner, where the creditors at large have no lien. I must say that the principal object in directing this issue was, as it was a case of great importance, to give an opportunity of completely considering and reviewing the law on the subject. But I am very clear that Benjamin B. Eshelman's interest, or want of interest, cannot be shown by evidence of debts due from the firm, and that the testimony offered relative to the insolvency of the firm, and the interest of Daniel Howry in the application of the funds of the firm to the payment of its debts, cannot be admitted."

To this opinion, overruling the evidence offered, the defendants excepted.

Although the issue joined was between the separate execution creditors of the respective partners, the counsel for the defense appeared for the joint creditors of the firm to controvert the right of the separate creditors of Eshelman to be paid out of the fund in court before the joint creditors were satisfied, and they alleged that after the executions of the separate creditors were levied Howry & Eshelman had made an assignment to trustees for the benefit of the creditors of the firm.

The only question now raised in this court, upon the charge of the

court below and the bill of exceptions, was whether the separate execution creditors of Eshelman had a right to be paid out of the proceeds of the sales of the goods of the firm before the joint creditors were satisfied out of that fund.

GIBSON, C. J. It is settled by a train of decisions in the American as well as the British courts that the joint effects belong to the firm, and not to the partners, each of whom is entitled only to a share of what may remain after the payment of the partnership debts, and, consequently, that no greater interest can be derived from a voluntary assignment of his share, or a sale of it on execution. That a contract which enables the parties to keep a class of their creditors at bay, and yet retain the indicia of ownership, should not have been deemed within the statutes of Elizabeth, is attributable exclusively to the disposition universally manifested by courts of justice to encourage trade. But, such as it is, has the contract of partnership been established; and the principle which enables the partners to pledge to each other the joint effects as a fund for payment of the joint debts has introduced a preference in favor of the joint creditors, founded on no merits of their own, but on the equity which springs from the nature of the contract between the partners themselves. The author of the Commentaries on American Law (volume 3, p. 38) attributes this preference to an inherent equity in the joint creditors themselves, arising from a supposed acquisition of the partnership effects from their means. The opinions of Chancellor Kent are so justly entitled to deference that no prudent judge will differ from him without hesitation. Yet I cannot but adhere to the opinion I expressed in Bell v. Newman, 5 Serg. & R. 92, that in cases of insolvency or bankruptcy, in which alone the question of priority can be material, the joint effects consist of the wreck of the capital originally embarked. Under a joint commission, by which the effects pass to the assignees, while the partners are personally discharged, I admit that the preference of the joint creditors has no other foundation, if it has any at all, than this supposed inherent equity; and the best elementary writer on the subject so disposes of the difficulty. Gow on Partnership, 311, 312. But in the case of a separate commission Lord Eldon expressly puts it on the particular equity of the partners themselves. Ex parte Ruffian, 6 Ves. 119. And in the case of an execution, Chief Baron M'Donald does the same. Taylor v. Fields, 4 Ves. 396. To secure the firm from the extravagance of its members, by preventing the capital from being withdrawn from the purposes of the partnership, the stock is pledged for the burden which, from the nature of the connection, is to be borne by all; but, in molding the law of partnership to its present form, the credit gained by giving the joint creditors a preference was, if an object at all, a very remote one. Accordingly, with the single exception of a joint commission, we find that, wherever the partners are not individually involved, the joint creditors have no

preference whatever, as in the instance of a bona fide assignment of the effects to one of the partners after the partnership has been dissolved.

In consequence of the rule as I have stated it, a separate execution creditor sells, not the chattels of the partnership, but the interest of the partner, incumbered with the joint debt; and the joint creditors, therefore, have no claim to the proceeds. To allow them the proceeds, and recourse to the property in the hands of the purchaser, would subject it to a double satisfaction. Neither can they take the proceeds or the property at their election. They can interfere at all only on the ground of a preference, which has regard only to the partnership effects; and these have not been sold, but only the subordinate interest of the partner, which was, strictly speaking, his separate estate. Their recourse, therefore, is necessarily to the property in the hands of the purchaser. Now, had the sheriff sold the interest of but one of the partners, the execution creditor would have clearly been entitled to the proceeds. But although he sold the whole stock at one operation, on separate executions against both, there was, in contemplation of law, a separate sale of the interest of each. What, then, would have been the effect had these sales been made consecutively? The first in the order of time would have passed the interest of the partner, subject to the equity of his copartner, and the execution creditor would have been entitled to the price. But this equity, together with the remaining interest of the other partner, would have passed by the succeeding sale to the same purchaser; the execution creditor, in that instance, also taking the proceeds. Can it make a difference, then, that instead of being consecutive these two sales were simultaneous? A curious question might arise whether separate purchasers of the shares, respectively, would stand in the relation of partners, so as to enable the joint creditors to follow the goods. It seems to me they would not, because not personally involved in payment of the debts. Here, however, where the shares of the partners are united in the same purchaser, every semblance of partnership equities is at an end. As regards the goods in the hands of the purchasers, this is conceded; but the joint creditors insist that the proceeds are to be substituted for the goods and subjected to the same equities. That might be done if the proceeds belonged to the partners; but it is not easy to imagine how they are to be treated as the owners of money raised by a sale on executions against them. For what purpose should the ownership of it be vested in them, even for an instant? Not to give the joint creditors a preference, for that would make the rights of the partners depend on the claims of the joint creditors, who, on the contrary, can claim nothing but by virtue of the lien, where there is one, of the partners. To say that the partners have such a lien because the joint creditors have an equity, and that the joint creditors have an equity because the partners have a lien, would be to argue in a circle. Here the partners cannot be prejudiced in respect of their claims on each

other; the advantage to be gained from an application of the joint effects to their separate debts being mutual and equal. The consequences are precisely the same as if the effects had been sold on an execution against both. We are therefore of opinion that the joint creditors cannot interpose, and, consequently, that the rejection of the evidence, as well as the direction to the jury, was substantially right.

I have considered the question on principles applicable to it, in analogy to well-settled parts of the law of partnership, rather than on authority bearing directly on the point. But since this opinion was drawn my Brother HUSTON has directed my attention to the case of Brinkerhoff v. Marvin, 5 Johns. Ch. (N. Y.) 320, which is direct to the point, so that, independent of analogies, we have an authority on which we might safely rule the cause. But both principle and authority are adverse to the preference claimed, and the issue, therefore, was correctly found for the plaintiff.

HUSTON, J., dissented.

Judgment affirmed.

MENAGH v. WHITWELL et al.

(Court of Appeals of New York, 1873. 52 N. Y. 146, 11 Am. Rep. 683.)

Appeal from a judgment in favor of the plaintiff entered upon the report of a referee. This was an action for converting machinery, utensils, lumber, and other chattels formerly belonging to the firm of J. C. Smith & Co. and appertaining to a yeast factory operated by that firm.

From the 17th of August to the 22d day of December, 1866, the firm consisted of John C. Smith, Hollister E. Goodwin, John Wride, Marietta Huntington, and William B. Rubert, each being interested to the extent of one-fifth. The firm as thus constituted contracted debts to the Geneva National Bank upon which judgments were afterward recovered against the above-named parties, viz., one judgment for $1,403.83, and one for $237.53, both recovered May 21, 1867. The larger judgment embraced claims to the amount of $330 which accrued after the withdrawal of John Wride from the firm. Executions were issued on these judgments on the 25th of May, 1867, and placed in the hands of the defendant Ringer, who was deputy sheriff of Ontario county, and by virtue of those executions he levied upon the property on the 19th of July, 1867, and sold it on the 29th of July, 1867. The defendant Whitwell was sheriff, and this action was brought against him and his deputy for that levy and sale. The plaintiff recovered four-fifths of the value of the property.

The plaintiff makes title to this four-fifths as follows: On the 22d of December, 1866, John Wride assigned all his interest in the property and business of the firm to John C. Smith, who agreed to pay the

firm debts, and on the 4th of February, 1867, Marietta Huntington assigned all her interest in the property of the firm to said John C. Smith, who assumed her place in the firm. After these transfers the same business was carried on by the remaining partners under the same firm name. The referee finds that both of these transfers were made with the consent of all the other members of the firm, and in good faith, without intent to defraud the creditors of the firm.

On the 28th of February, 1867, the firm then consisting of John C. Smith, William B. Rubert, and Hollister E. Goodwin, and Smith's interest being then three-fifths, he gave to the plaintiff a chattel mortgage upon his undivided three-fifths interest in the yeast factory, property, accounts, and other choses in action of the firm to secure his individual debt to the plaintiff of $2,100, payable in installments in two, five, and seven months, with power to take possession and sell in case of default, or whenever she should deem herself unsafe before default. The referee finds that this amount was justly due the plaintiff for money loaned by her to Smith, which he had used for the firm and for which it was indebted to him, and that the mortgage was given in good faith, with the consent of all the persons composing the firm, and without intent to defraud creditors. There is no express finding in respect to the solvency of the firm at the time of the giving of this mortgage.

On the 2d of February, 1867, William B. Rubert had given a like chattel mortgage on his one-fifth interest to Samuel E. Rubert to secure an individual debt of $500, payable in five days. The referee finds that this was a just debt for money loaned, and that the mortgage was executed in good faith to secure the debt, and without any fraudulent intent. It does not appear that any of the other partners consented to this mortgage.

On the 10th day of May, 1867, the plaintiff and Samuel E. Rubert took possession of the property mentioned in their respective mortgages, and after advertisement it was sold on the 18th of May, 1867; the three-fifths interest of John C. Smith being purchased by the plaintiff for $1,000, and the one-fifth interest of William B. Rubert being bought in by Samuel E. Rubert for an amount less than his mortgage. On the same day John C. Smith sold and delivered to the plaintiff all his interest in a quantity of lumber, boxes and other material then on the premises, and belonging to the firm, for $200, which was applied in part payment of the plaintiff's mortgage. The referee finds that this sale was in good faith and without any fraudulent intent. This lumber, etc., was levied upon and sold by the defendants and is embraced in the plaintiff's recovery. On the same day on which the plaintiff and Samuel E. Rubert took possession under their mortgages, viz., the 10th of May, 1867, Hollister E. Goodwin, the only remaining member of the firm, transferred his undivided one-fifth interest in the property and business of the firm to Mary B. Goodwin, who still owns the same, but never became a member of the firm. The referee has not

found that there was any consideration for this transfer, or what was its object, or that it was made in good faith.

The only findings in respect to the solvency of the firm at the times of these several transactions are that, on the 22d of December, 1866, when John Wride withdrew from the firm, transferring his interest to John C. Smith, the firm was somewhat embarrassed, but was not known or believed to be insolvent by either Wride or Smith, and that on the 4th of February, 1867, when Marietta Huntington transferred her interest, the financial affairs of the firm were about the same as they were on the 22d of December, 1866; that the firm was largely indebted and somewhat embarrassed; that the value of its property and assets depended in part upon the continuance of its business, and, in case such business was continued and properly managed, the property and assets of the firm were more than sufficient to pay its debts. The referee further finds that at the time of the seizure and levy by the defendants the property was in the possession of the plaintiff and Samuel E. Rubert, and was of the value of $2,150; that the plaintiff was the owner of an undivided three-fifths, and Samuel E. Rubert of one undivided fifth part thereof; that Mary B. Goodwin was the owner of the other undivided fifth part thereof; and that, on the 15th of August, 1867, and before the commencement of this action, the said Samuel duly assigned to the plaintiff all his right to the property and cause of action against the defendants for taking possession thereof.

As conclusion of law he finds that at the time of the levy neither of the defendants in the execution had any leviable interest in the property, but that it belonged, four-fifths to the plaintiff, and one-fifth to Mary B. Goodwin; that the bank had no lien thereon; and that the plaintiff was entitled to recover four-fifths of the value, amounting to $1,720, with interest from the time of the conversion.

RAPALLO, J. The mortgages executed by John C. Smith and William P. Rubert appear to have been regarded by the learned referee as transferring an undivided four-fifths of the corpus of the partnership property therein described. He has found, as to the mortgage from Smith, that it was executed and delivered with the assent of the other members of the firm. This mortgage, if such be its true construction, having been given to secure the individual debt of the partner, even if effectual as to the firm, by reason of the concurrence of all the partners giving it, would be a fraudulent misapplication of the partnership property, and void as to the creditors of the firm, under the principle of the cases of Ransom v. Vandeventer, 41 Barb. 307, and Wilson v. Robertson, 21 N. Y. 587, unless the firm were solvent at the time the mortgage was given, and sufficient property would remain, over and above that devoted by that instrument to the payment of the individual debt, to pay the debts of the firm. The Supreme Court have considered that the findings of the referee fail to disclose any insolvency, but, on the contrary, establish solvency of the firm at the time the mortgages were given. We cannot concur in this view of the ef-

fect of the findings, but think that the facts found show that the firm was insolvent when the mortgages were given, and, if there were any doubt upon that point, they clearly establish that the diversion of four-fifths of its properties to the individual debts of two of the partners would make it insolvent.

According to these findings the firm was, in February, 1867, and had been from December, 1866, largely indebted and embarrassed, and the value of its property, and its consequent ability to pay its debts, depended in part upon the continuance and proper management of its business. The mortgages were given on the 2d and 28th of February, 1867. If they were intended to be liens upon the corpus of the property, as they have been treated by the referee, and not merely liens upon the surplus which should belong to the partners, respectively, after the payment of the firm debts, it is evident, from the facts stated as existing at the time, as well as from the result, that their enforcement would prevent the firm creditors from collecting their demands out of the firm property, and that, under the principle of the cases cited, they were fraudulent and void as to such creditors. If so, the mortgagees, by purchasing at the sale under the mortgages, acquired no valid title as against such creditors, and the plaintiff was, consequently, not entitled to recover.

Assuming, however, that the mortgages were intended to pass merely the individual interests of the mortgaging partners in the common stock, and for that reason were not fraudulent as to the firm creditors, then it becomes necessary to consider their legal effect upon the rights of creditors of the firm. It is clear that the remaining partner was entitled to the control of the firm property so long as he retained his interest, and to apply it to the firm debts, and that the mortgagees acquired only a right to the surplus, if any, which would be found to belong to the mortgagors on the settlement of the accounts.

And so long as any of the partners had this dominion over the firm property it can hardly be questioned that it was subject to levy on execution at the suit of a firm creditor. Lovejoy v. Bowers, 11 N. H. 404; Coover's Appeal, 29 Pa. 9, 70 Am. Dec. 149; Pierce v. Jackson, 6 Mass. 243.

But the point upon which the judgment was sustained in the Supreme Court, at General Term, was that after the execution of the mortgages H. E. Goodwin, the only remaining partner, made a separate transfer to a third party of his individual interest in the partnership properties, and on this ground it was held that when the execution was levied none of the defendants in the execution had any leviable interest in the property levied upon, and it was further held that the plaintiff, who had purchased the interest of S. E. Rubert under his mortgage, was entitled, by virtue of the two mortgages and of the purchase at the sale under them, to recover the value of four-fifths of the corpus of the partnership property levied upon by the defendants, without regard to the partnership debts.

This position is not without authority in its support. It is founded upon the theory that the separate transfers of the individual interests of all the partners divested the title of the firm; that firm creditors have no lien upon the partnership effects, and no direct right to compel their application to firm debts in preference to individual debts; that the right to compel this application is an equity vested in the partners themselves, and exists only as between each other; that so long as this equity exists in any of the partners the creditors have an equity to compel its enforcement between the partners, and may by this means obtain the application of the partnership properties to their demands, in preference to the individual debts or separate dispositions of any of the partners—in other words, "that the equities of the creditors can only be worked out through the equities of the partners." From these premises the conclusions have been drawn that, if such equities are waived or released by the partners themselves, the creditors lose them, and that a transfer of the individual interest of a partner in the firm property to a third person extinguishes the equity of the partner, and consequently that of the creditors, which is dependent upon it. This doctrine has been carried to the extent of holding that, if the individual interests of each of the members of a firm are successively sold under executions against such members, respectively, for their individual debts, the purchasers acquire the corpus of the property free from the copartnership debts, and the equities of the partners and partnership creditors are extinguished. Coover's Appeal, 29 Pa. 9, 70 Am. Dec. 149.

The injustice and, it may be said, the absurdities which result from such a view lead to an inquiry into its correctness. A firm may be perfectly solvent, though the members are individually insolvent, and yet in such a case the doctrine that the property of the firm is divested, and the equities of the partners and partnership creditors are extinguished, by separate transfers of the individual interests of all the partners, might result, not only in an appropriation of all the properties of the firm to the payment of the individual debts, to the entire exclusion of the firm creditors, but to a most unjustifiable sacrifice and waste of such properties. For instance, suppose a firm to consist of three members, each having an equal interest, and to be possessed of assets to the amount of $300,000, and to owe debts to half of that amount, the interest of each partner, supposing their accounts between themselves to be even, is $50,000. The members of the firm are individually indebted. One of them sells his share, and receives for it $50,000, which is its actual value. The share of another of the partners is sold under execution, and brings its full value, $5,000. Thus far one partner remains, and he has an equity to have the firm debts paid, and those who have sold out are protected against those debts. The purchasers of the separate interests are entitled to the surplus only. The joint creditors still have their recourse against the partnership property, and the right to levy on such of it as is subject to sale on

execution; but before any levy the remaining partner sells out his individual interest, or it is sold on execution. According to the doctrine applied in the present case, and maintained in the case of Coover's Appeal, supra, the firm property is by this last sale relieved from the partnership debts, the two shares first sold are at once changed from interests in the surplus to shares in the corpus of the property free from the debts, their value is doubled, and the fund which should have gone to pay the joint debts is, without any consideration, appropriated by the transferees of the individual interests of the partners.

Such is, in substance, the operation performed in the present case. Assuming that the mortgages are intended to convey only separate interests of the mortgagors (which, as has been shown, is the only theory upon which they can escape being regarded as fraudulent), the mortgaged property was, at the time the mortgages were given, liable to be taken for the partnership debts. The mortgages were but a slender security, and their value dependent upon the firm debts being paid. This state of affairs continued so long as Hollister E. Goodwin retained his one-fifth interest in the firm. The firm property was legally under his dominion for the payment of firm debts; and the firm creditors, if they then had their execution, could have rightfully levied upon it, or availed themselves of Goodwin's equity as to any property which must be reached in that form. But on the 10th of May, 1867, Hollister E. Goodwin made a transfer of his interest in the property of the firm to one Mary B. Goodwin; and on the same day the plaintiff and Samuel E. Rubert took possession under their mortgages. The referee has not found what was the consideration or purpose of this assignment from Hollister E. to Mary B. Goodwin, nor has he expressly found that it was made in good faith. But the effect claimed for it is that, Hollister E. Goodwin being the only remaining partner, the transfer of his interest divested him of his dominion over the partnership property and of his equity to require the application of the partnership property to the payment of its debts, and that, as the partnership creditors could only reach the property through him, he, by this transfer or surrender of his rights, had cut off their access to it, and thrown it into the hands of the transferees of the individual partners, unincumbered by firm debts.

Waiving any question as to the bona fides of this transaction, the referee not having found it fraudulent, and treating the sale of Goodwin's interest as if it had been made under an execution against him, we come back to the question whether the consequences claimed do legally follow from separate sales of the individual interests of the several partners.

It would be a superfluous labor to trace the history of the changes which have, from time to time, taken place in the views of the courts respecting the nature of the interests of individual partners in the common stock of a firm, and the respective rights of separate and joint

creditors; but it is sufficient to observe that they have resulted in a general recognition of the doctrine that as between a firm and its creditors the property is vested in the firm, and that no individual partner has an exclusive right to any part of the joint stock until the firm debts are paid and a balance of account is struck between him and his copartners, and the amount of his interest accurately ascertained.

The corpus of the effects is joint property, and neither partner separately has anything in that corpus; but the interest of each is only his share of what remains after the partnership debts are paid and accounts are taken. West v. Skip, 1 Ves. 239; Fox v. Hanbury, Cowp. 445; Taylor v. Fields, 4 Ves. 396; 15 Ves. 559, note; Pierce v. Jackson, 6 Mass. 243; Doner v. Stauffer, 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 370; 2 Kent, Com. (11th Ed.) 78, note; Collyer on Partn. (3d Am. Ed., by Perkins) pp. 704 to 710, notes to § 822; Story on Partn. notes to §§ 261, 262, 263; Crane v. French, 1 Wend. 311; Witter v. Richards, 10 Conn. 37.

Partnership effects cannot be taken by attachment or sold on execution to satisfy a creditor of one of the partners, except to the extent of the interest of such separate partner in the effects, subject to the payment of the firm debts and settlement of all accounts. 3 Kent, Com. (11th Ed.) 76.

Purchasers of the share of an individual partner can only take his interest. That interest, and not a share of the partnership effects, is sold, and it consists merely of the share of the surplus which shall remain after the payment of the debts and settlement of the accounts of the firm. 3 Kent, Com. (11th Ed.) 78, note "b."

No more property can be carried out of the firm by the assignee of one partner than the partner himself could extract after all the accounts are taken. 1 Ves. 241 (Am. Ed.) note; 15 Ves. 557.

No person deriving under a partner can be in a better condition than the partner himself. Fox v. Hanbury, Cowp. 445.

A partner has no right, by an assignment of his interest, to take from the creditors or other partners the right to have their claims against the partnership satisfied out of its property. A mortgage made by one partner of his undivided interest cannot avail against the creditors of the partnership who attach the partnership property. Lovejoy v. Bowers, 11 N. H. 404.

These principles have been enunciated in a great number of cases, where some one at least of the partners retained his equity to have the firm debts paid, and the rights of the creditors to assets or proceeds, which have come under the control of a court of equity, have been worked out through the equity of that partner. But I find no case in which the consequences of transfers of the separate interests of all the partners to outside parties has been considered, except the case of Doner v. Stauffer, 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 370, and Coover's Appeal, 29 Pa. 9, 70 Am. Dec. 149, before referred to. In neither of these cases is the point adjudicated, for in both cases the

joint creditors intervened before the sale of the interest of the last remaining partner, and their right to priority was sustained, though the opinion of the court was expressed as to what the result would have been if all the individual interests had been first sold.

There is another class of cases in which the partnership effects have been held to be liberated from liability to be applied to partnership debts in preference to the separate debts of one partner; that is, where a bona fide sale has been made by a retiring partner, in a solvent firm of two members, to his copartner, the latter assuming the debts. In such a case it is settled that the property formerly of the partnership becomes the separate property of the purchasing partner, and that the partnership creditors are not entitled to any preference as against his individual creditors in case of his subsequent insolvency. Ex parte Ruffin, 6 Ves. 119; Dimon v. Hazard, 32 N. Y. 65. But in those cases the joint property was converted into separate property by the joint act of all the members of the firm. They had power to dispose of the corpus of the joint property, and the exercise of that power, when free from fraud, divested the title of the firm as effectually as if they had united in a sale to a stranger. It remained subject to execution for firm debts so long as it continued in the hands of the purchasing partner. It is conceded that the creditors have no lien which would affect the title of a purchaser from the firm. But the question now is: What is the effect upon the title of the firm, as between it and its creditors, of transfers by the partners severally of their respective interests to third persons? Where the property remains in specie, and no act has been done by the firm to divest its title, but the partners have made separate transfers of their respective individual interests to different persons, is it still to be regarded, as to the firm creditors, as firm property, or has it become the absolute property of the several transferees of the interests of the individual partners?

It has been shown that no share in the corpus of the property passed by either of these transfers separately, but merely an interest in the surplus, and which should be ascertained on an accounting after payment of the firm debts. But it is claimed that, when all the partners have assigned, their interest in the property is divested, and their equity is destroyed, and therefore the property is released from the debts, and what was at the time of the assignment a share of a contingent surplus has been converted into a share of the corpus of the property. Is this position sound? When a partner sells his interest in a firm to a person other than his copartner, or it is sold on execution against him, does he thereby lose all equity to have the firm debts paid out of the assets?

When he sells to his copartner he relies upon his assumption of the partnership debts, and unless he stipulates for an application of the assets to that purpose he parts with all lien upon them. But when he sells to a stranger not liable for the debts, or his interest is sold on execution, is not the right to have the debts paid out of the prop-

erty a right of indemnity personal to himself, and which does not pass by the sale? Could it be tolerated that the interest of a partner should be sold under execution against him, on which sale only the value of his interest in the surplus could be realized, and that the purchaser should be allowed to take the corpus of the property and leave him liable for the debts? If the legal effect of the transfer were set forth in the instrument, it would be seen that all the purchaser acquired was a right to an account and to the partner's share in the surplus after payment of debts, when ascertained, and that he had no right to that part of the property which was required for the payments of debts; that the sale was subject to the debts. 3 Kent, Com. 76–78. The partner whose share was sold would manifestly have an interest in the protection and appropriation of that part of the property in discharge of his own liability to the firm creditors.

I do not see how this right can be affected by the question whether the separate interests of all or only one of the partners is thus sold. Each of the purchasers would acquire an interest merely in the surplus, and each partner whose interest was sold would have the right to indemnity against the firm debts by the application to such debts of so much of the property as might be necessary for the purpose. These debts must have been taken into consideration in fixing the price of the interest sold, and consequently allowed to the purchaser, and the partnership assets are the primary fund for their payment. The case differs materially from a sale by a retiring copartner to his copartner, who is personally liable for the debts directly to the creditors; but even such a sale is valid only when there is no insolvency at the time. To sell to an insolvent partner would be a clear fraud. How much more clearly apparent would be the injury to creditors by a sale to a person not liable for the debts, if such sale had the effect to relieve the property from them.

It can hardly be necessary, where the firm property remains in specie, and is tangible and capable of being levied upon, to resort to the equities of the partners in case there has been no transfer by the firm and the only adverse claimants are assignees of the individual interests of the several partners for their separate debts. The right of the firm creditor to levy on property thus situated can be sustained on two grounds. If the effect of any of the transfers is to divest the title of the firm, then, if effected by the acts of the partner, they are clearly fraudulent and void as to firm creditors, as is shown in the cases of Ransom v. Vandeventer, 41 Barb. 307, and Wilson v. Robertson, 21 N. Y. 587. An appropriation to the individual debt of one partner of any part of the firm property, even with the assent of his copartners, is illegal and void, provided the firm is not left with sufficient to pay its debts. How absurd it would be to hold that all of the partners, by making separate assignments of their respective shares in the firm property to their individual creditors, could effectually divest the firm of all its property and apply it to their individual debts,

leaving nothing for the partnership creditors. But the simple solution of the question is to hold that the title of the firm, as between it and its creditors, to the corpus of the property, or at least to so much of it as is necessary for the debts, is not divested by these separate transfers to strangers.

As is stated by Prof. Parsons, in his work on Partnership (pages 356 to 362 [2d Ed.] c. 10, § 1), a partnership, though neither a tenancy in common nor a corporation, has some of the attributes of both. The well-established rule which excludes creditors of the several partners from the partnership property until that has paid the debts of the partnership is derived from the acknowledgment that a partnership is a body by itself. In its relation to its creditors it is placed upon the basis of having its own creditors and possessing its own property, which it applies to the payment of its debts, and after this work is done there is a resolution of the body into its elements.

Until some act is done by the firm to transfer the joint interest, no separate act of either or all of the partners, or proceedings against them individually with reference to their individual interests, should be held to affect the title of the firm, so as to preclude a creditor of the firm, having a judgment and execution, from levying upon the joint property. To hold that separate transfers of their individual shares by the several partners can convey a good title to the whole property free from joint debts would be to return to the doctrine, long since exploded, that partners hold by moieties as tenants in common. In the present advanced stage of the law upon this subject, no established rule is violated by holding that the title of the firm, as between it and its creditors, cannot be divested by the acts of the partners severally, not in the business of the firm, nor by the separate creditors of members of the firm (further than such temporary interruption of the possession as may be necessary to enable the officers of the law to make an effectual sale of the interest of the debtor partner). This view does not recognize any lien of partnership creditors upon the firm property. The firm have power to dispose of it without regard to the creditors, provided the disposition be not fraudulent. But the individual members or their creditors ought not to have any such power, and all transfers made by them for individual purposes should be held inoperative upon the corpus of the property, so long as there are firm debts unpaid for which the property is required. As against firm creditors, no greater effect should be given to such transfers when made by all the partners separately than when made by a portion of them, but the property should be deemed to continue in the firm until its title has been divested by some act of the firm.

My conclusion is that, as between the firm of J. C. Smith & Co. and its creditors, the property levied upon by the defendants remained the property of the firm, and subject to levy on execution against it, notwithstanding the transfers by the several partners of their respective individual interests.

I have not adverted to the changes which took place in the firm by the retirement of John Wride and M. Huntington, and the transfer by them of their interests to J. C. Smith, intermediate the contracting of the debt to the Bank of Geneva and the levy, the effect of these changes being fully considered in the opinion of my learned associate, ALLEN, J.

The judgment should be reversed, and a new trial ordered, with costs to abide the event.

ALLEN, J. I fully concur in the legal conclusions of my Brother RAPALLO, and for the reasons assigned by him. * * *

A single question only will be considered, and that is as to the effect of the retirement of two of the partners, Wride and Huntington, by the transfer of their interests to another partner, Smith, after the debts were contracted with the Geneva National Bank, and before the recovery of the judgments upon which the property was seized by the defendants. That the withdrawal of two of the five partners, and a transfer of their interests to one of the three remaining partners, was a dissolution of the copartnership that had theretofore existed, is not controverted; that is, although a firm, composed of a part of the members of the old firm, continued the business in the same name, still it was not composed of all the original members of the firm, and therefore, strictly, the old partnership was dissolved and superseded by the new organization. But the dissolution had respect to the future, and not to the past. Past transactions and existing liabilities, and the relative rights and obligations of the several partners, or the rights of creditors, in respect to past transactions and dealings, were not affected by the mere act of dissolution resulting from such withdrawal of the two and the assignment of their interest, aside from any conventional arrangement between the partners, or between them and their creditors, by which their respective and relative rights might be changed. The partners all continued liable in solido for the debts due by the firm, and all the joint property continued liable for the joint debts as it was before.

HEATH, J., says, in Wood v. Braddick, 1 Taunt. 104: "When a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future. With regard to things past, the partnership continues and always must continue." And Lord Mansfield, C. J., in same case says: "The powers of partners with respect to rights created pending the partnership remain after the dissolution." And see Parsons on Partnership, 386, 396.

From the time of the withdrawal of the two partners their power to act for or represent the continuing members of the firm in new transactions ceased, and perhaps they relinquished their right to contract or deal with the joint property as they might have done in concurrence with the other partners, had the partnership been closed, and the business settled up, instead of being continued with a change in its membership. It is said, also, that one partner, selling his inter-

est to a copartner, who assumes his share of the partnership debts, does not, in the absence of a stipulation to that effect, have any lien, equitable or otherwise, upon the firm property for the payment of the joint debts for which he still remains liable. Dimon v. Hazard, 32 N. Y. 65. This must be so when new rights have attached by reason of such change of interests, as where the transfer is to a sole partner, who becomes thereby the individual owner of the property, and rights of individual creditors have accrued, as in Howe v. Lawrence, 9 Cush. (Mass.) 553, 57 Am. Dec. 68, and Robb v. Mudge, 14 Gray (Mass.) 534, or where the new firm which has resulted from the change of interests has exercised the jus disponendi which it has over the property, or there are creditors of the new firm who have the quasi lien recognized by the law. But I see no reason why, so long as the retiring partner remains liable with the others for the joint debts, and no adverse or paramount rights or liens have attached to the joint property, the same equity should not be recognized as existing in him to have the joint property subjected to the payment of the joint debts that he would have had as a continuing partner.

But, whatever may be the rights and equities of Wride and Huntington, the retiring partners, the equities of the continuing partners, especially those of Rubert and Goodwin, were not impaired or affected by the transfer of interests by Wride and Huntington to Smith, the other partner. By those transfers Smith only acquired the same interest in the property of the firm that any other transferee would have acquired; that is, a right, as to the two-fifths thus purchased, to an account and to share to that extent in the surplus of the property of the firm. The fact that he was a partner does not change the character or the legal effect of the transaction. It was an arrangement between three of five partners, and they could not dispose of the corpus of the joint property to the prejudice of the other partners or the creditors of the firm, or destroy the joint interest which before existed. Smith took the transfer, subject to the rights of the other partners as to the joint property, and the share or portion of the retiring or withdrawing members. The rights of an assignee or transferee of the individual share or interest of a partner in the joint property are well settled to be but a right to an accounting, or to what shall remain after the adjustment of the partnership accounts and dealings. Mumford v. McKay, 8 Wend. 442, 24 Am. Dec. 34; Nicoll v. Mumford, 4 Johns. Ch. 522.

The assignee of a partner's interest cannot withdraw his share of the joint effects. They must remain in the possession of the continuing partners for the purpose of winding up the partnership which has been dissolved by the assignment. Horton's Appeal, 13 Pa. 67.

Smith could no more have withdrawn the share of Wride and Huntington, to which he had succeeded, than he could withdraw his own original share in the joint effects of the firm, without the consent of his copartners.

Although the original partnership has ceased to exist, the rights of the partners have not been impaired. The new firm acquired and had the absolute power of disposal; and, had the joint property been transferred by the joint act of all, the creditors of the old firm would have lost their quasi lien, or their right to pursue this property, unless they could impeach the transfer for fraud.

Had the firm, after the change of interests therein, incurred liabilities and contracted debts, a question would have arisen between the creditors of the old and new firms, and the creditors of the new would have been preferred. But no such question is in this case. The property of the original firm, composed of the five members, is still joint property with respect to the partners still retaining an interest in it, who are tenants in common, and the creditors of that firm to whom all the parties remain liable, and through whom and whose equities and the equities of each of them they can, in the language of the books, work out their rights.

Judge Story says: "In case of a dissolution each partner holds the joint property clothed with a trust to apply it to the payment of the joint debts, and, subject thereto, to be distribued among the partners according to their respective shares therein." Story on Partn. § 360. Here the three partners composing the new firm, as partners and tenants in common, held this property clothed with this trust, and neither could withdraw any part of it, nor do any act to impair this trust. All must unite in order to give effect and validity to any disposal of the property, except in execution of the trust or in the ordinary course of business. A transfer in payment or security of an individual debt of one is not such an act, and does not impair the trust or affect the rights of the other tenants in common or partners, or creditors having claims to be enforced through their equities. It is only when the rights of partners as such with respect to the joint property are gone that the quasi lien of creditors is destroyed. While this right of creditors is spoken of as in the nature of a lien or quasi lien and depending to a great extent upon the equities of partners inter se, it is to be enforced against the joint effects of the partners by a common-law action and common-law remedies, except where the dissolution is by the death or bankruptcy of one of the partners. Story on Partn. § 361.

The parties who claim to have acquired severally, by transfer from the individual partners, the respective shares of such partners, each having only the right which the law gives the assignee of the share of a single partner, if they have in any way obtained possession of the property itself, must hold it clothed with the trust which would have attached to it in the possession of the partners, their assignors, and as to the corpus of the property it remains the joint property of the firm, and liable to be seized for its debts. There has been no distribution of the property among the partners, and it has not been transferred by them as partners by any joint act, or by the act of one in the name of all, and no creditors of the later firm assert any claim

to it. So long as the property continues, the firm creditors may assert their priority of right to it as against the creditors or transferees of individual partners. Allen v. Center Valley Co., 21 Conn. 130, 54 Am. Dec. 333; 2 Story, Eq. Jur. § 1253. It is joint quoad the partners and the firm creditors, so long as any one of the partners may insist upon the partnership claims to it. Crawshay v. Collins, 15 Ves. 237; Peacock v. Peacock, 16 Ves. 57. Here neither the partners, nor any one claiming as creditors of or under title derived from the firm, assert any claim to the property adverse to the defendants. Had a stranger to the first firm come into the second in the place of the retiring members, a different question would have arisen. But here the continuing members of the firm are all liable for the debts of the old firm, and as successors of that firm have possession and ownership of its property, primarily chargeable with the payment of its debts, and there is no foundation in principle for the claim that each of the partners can transfer his share, subject only to the claims that may exist growing out of the new relation of the partners consequent on the withdrawal of the two retiring members, and this must be established to entitle the plaintiff to hold her judgment. If Rubert and Goodwin could only assert a lien for the liabilities of the three as a firm incurred after Smith acquired the additional two-fifth interests from Wride and Huntington, then the plaintiff has a good title to the undivided share and portion of the corpus of the estate for which she has been permitted to recover in the court below; otherwise not.

We are cited to several cases, of which Ex parte Ruffin, 6 Ves. 119, is the pioneer, as showing that, upon the dissolution of a partnership by the retiring of one, the creditors of the firm lose all power to enforce the payment of their debts from the joint property. But such is not the effect of the decisions, nor can such a principle be deduced from them. They are entirely consistent with the views now taken of the rights of the parties to this action. Ex parte Ruffin was the case of a dissolution of partnership between two; one retiring and assigning the partnership property to the other, who continued the trade and became bankrupt. It was decided, and could not well have been decided otherwise, that by the dissolution and transfer the property became the individual property of the bankrupt, and liable to his individual debts in priority to the debts of the former partnership. The retiring partner gave to the bankrupt the entire property, with the absolute right of disposal, and the Lord Chancellor held that joint debts could not be proved against the individual estate. The like question presented in Dimon v. Hazard, 32 N. Y. 65, Horton's Appeal, supra, and Robb v. Mudge, 14 Gray (Mass.) 534, received the same solution. The same principle was applied in Smith v. Howard, 20 How. Prac. 121, and Baker's Appeal, 21 Pa. 76, 59 Am. Dec. 752.

The only difference in the several cases was circumstantial, and did not call for the application of any other or different rule. The decisions all stand upon the same reasons. In the last two cases the re-

tiring partner transferred his interest to several partners, who continued the business, and it was held that the firm creditors had no such lien upon the property as would prevent the disposal of the property by the joint act of those who had become the owners or deprive the creditors of the new firm of a priority. Smith v. Howard sustained an assignment by the two partners, to whom the other partner had transferred his interest for the benefit of creditors, in which a note indorsed by a third person as their security and given to the retiring partner in payment for his interest was preferred. In Baker's Appeal a like assignment by the continuing partners, preferring the debts of the new firm, was sustained. These cases are clearly distinguishable from this. If the partners who had acquired the joint right to dispose of the property had exercised it without fraud, and as the creditors of the first or former firm had no specific liens, they could not, in the absence of any fraud, have impeached the transfer.

Judge Gibson, in Doner v. Stauffer, supra, intimates an opinion upon a theoretical case adverse to the views now taken. While restricting the purchaser of the share of a single partner to what might remain after payment of the partnership debts, he says: "A curious question might arise whether separate purchasers of the shares, respectively, would stand in the relation of partners, so as to enable the joint creditors to follow the goods"—and intimates an opinion in the negative; but the question was not in the case. To me it seems illogical, the premises being granted that a sale by a partner, or upon an execution against him for an individual debt, carries only a right to what may remain after the payment of the partnership debts, thus affirming the right of partnership creditors to a priority of payment and a quasi lien on the joint effects, to declare that such preference is destroyed and right lost by distinct, independent transfers of the individual interests of the several partners, and that, while each partner, or the creditor of each individual partner, can only have dominion or acquire a title for the surplus, when each has exercised this right, or the individual creditors of all have seized and sold this right to the surplus, the rights of each are at once enlarged by relation as of the time of the first transfer of interest of any one of the partners to the destruction of the acknowledged rights of the partners inter se and of the joint creditors.

In Brinkerhoff v. Marvin, 5 Johns. Ch. 320, separate and successive judgments against individual partners for a single partnership debt were held entitled to be paid from the partnership funds; the chancellor giving the same effect to the two judgments as if they had been consolidated in a joint judgment against both the partners.

This is, so far as reported decisions have come under my observation, a case of the first impression; but by the application of well-established principles, and carrying to their legitimate and logical results the doctrines fairly deducible from authoritative adjudications, and giving proper effect to the recognized rights and equities of part-

nership creditors, as now understood, the plaintiff did not acquire a valid title to the partnership effects, or to any part or undivided share or portion thereof, so as to give her a property in the corpus of the goods and effects as against the judgment and execution creditors of the firm.

The judgment should be reversed, and a new trial granted.

SECTION 8.—EFFECT OF DEATH OF PARTNER ON FIRM PROPERTY.

* * * An exception is to be made of two joint merchants; for the wares, merchandizes, debts or duties, that they have as joynt merchants or parteners, shall not survive, but shall go to the executors of him that deceaseth; and this is per legem mercatoriam, which (as hath beene said) is part of the lawes of this realm, for the advancement and continuance of commerce and trade, which is pro bono publico; for the rule is, that jus accrescendi inter mercatores pro beneficio commercii locum non habet.—Co. Litt. 182a.

JEFFEREYS v. SMALL.

(In Chancery, before Sir Francis North, L. K., 1683. 1 Vern. 217.)

Two persons having jointly stocked a farm, and occupied it as joint tenants, the bill was to be relieved against survivorship, one of them being dead; and though it was proved in the cause that the deceased was informed what the consequence of law was in case he should die, and that he thereupon replied he was content the stock should survive, yet the Lord Keeper was clear of opinion that the plaintiff ought to be relieved; and said, if the farm had been taken jointly by them, and proved a good bargain, there the survivor should have had the benefit of it; but as to a stock employed in way of trade, that should in no case survive. The custom of merchants as to bills of exchange is now extended to inland bills, and the custom of merchants is extended to all traders to exclude survivorship; and though it is common for traders in articles of co-partnership to provide against survivorship, yet that is more than is necessary; and he said he took the distinction to be, where two become joint tenants or jointly interested in a thing by way of gift or the like, there the same shall be

subject to all the consequences of law; but as to a joint undertaking in the way of trade or the like, it is otherwise, and decreed for the plaintiff accordingly.[1]

ANDREWS' HEIRS v. BROWN.

(Supreme Court of Alabama, 1852. 21 Ala. 437, 56 Am. Dec. 252.)

Bill by Thomas Brown, the surviving partner of the firm of E. L. Andrews & Co., against the representatives and heirs of E. L. Andrews and Z. Andrews, the deceased partners, for the purpose of obtaining control of certain stock and real estate standing in the name of the deceased partners and subjecting it to the partnership debts. The bill alleged that the property, although standing in the names of the defendants individually, was partnership property, and also the insolvency of the firm. The property had belonged formerly to a firm composed of E. L. and Z. Andrews, and when the firm with Brown as a member was formed the land was carried into the new firm and became part of the capital. A supplemental bill was filed, stating that part of the real estate had been purchased by E. L. Andrews for the firm at a foreclosure sale, and the property had been redeemed, and the money paid to Campbell & Chandler, attorneys for the deceased partners, and prayed that this be decreed to stand in place of the land itself. The chancellor decreed in favor of the complainant. Defendant brought error.

DARGAN, C. J. When a partnership is dissolved by the death of one or more of the partners, the legal title to all the personal property and choses in action belonging to the firm becomes vested exclusively in the survivor; not, indeed, for his own peculiar benefit, but for the purpose of paying the debts, and then dividing the net balance amongst those entitled, giving to the representatives of the deceased partner the same interest he would have taken had he been in life, and the firm had been dissolved, not by death, but by mutual consent. But as respects real property the case is different at law: for the legal title descends to the heir at law of the deceased partner, and a court of law, looking to the legal title alone, cannot regard or protect the mere equities of others. In a court of equity, however, real estate belonging to the firm is considered as personal property to this extent, at least: that it is liable to pay the debts of the firm, and then to distribution between the partners in the same manner as

[1] "When it is said that by the law merchant the jus accrescendi, or right of survivorship, does not take place among partners in trade, it is meant that it does not take place for the exclusive benefit of the survivor, as it does in a joint tenancy at the common law, but that the survivor holds the partnership fund for the payment of the partnership debts and the settlement of the partnership concerns, and the balance, if any, to be distributed equitably between the representative of the deceased partner and the survivor." Per Walworth, C., in Egberts v. Wood, 3 Paige (N. Y.) 517, 526, 24 Am. Dec. 236.

if it had been personal instead of real estate. These charges upon the real estate, being prior to the claims of the representatives of the deceased partner, override his wife's title to dower, as well as the title of his heir at law. The consequence is that the heir at law holds the legal title subservient to or in trust for the surviving partner, who is charged with the payment of the debts. These principles of law, in my opinion, are so well settled that they are no longer the subject of controversy. Story on Partn. 127 et seq.; Coll. on Partn. (Perkins' Ed.) 183–185; Pugh v. Currie, 5 Ala. 446; Pierce v. Trigg, 10 Leigh (Va.) 406; Delmonico v. Guillaume, 2 Sandf. Ch. (N. Y.) 366; Dyer v. Clark, 5 Metc. (Mass.) 562, 39 Am. Dec. 697; Ripley v. Waterworth, 7 Ves. 425; Dale v. Hamilton, 5 Hare, 369.

Inasmuch as the real estate is considered as personal for the purpose of paying the debts of the firm, and the surviving partner is charged with the duty of paying those debts, it must of necessity follow that he has the right in equity to dispose of the real estate for this purpose; for it would never do to charge him with the duty of paying the debt, and at the same time to take from him the means of doing it. Therefore, although he cannot by his deed pass the legal title to the purchaser, which descended to the heir of the deceased partner, yet, as the heir holds the title in trust to pay the debts, and the survivor is charged with this duty, his deed will convey this equity to his purchaser, and through it he may call on the heir for the legal title and compel him to convey. See Delmonico v. Guillaume and Dyer v. Clark, supra.

Applying these principles to the facts exhibited by the pleadings and proof in the case before us (but which we will not state in detail in this opinion), we can perceive no error in the decree; for the proof, we think, is abundant to show that, although the legal title to the lands was held by E. L. Andrews alone, nevertheless they belonged to the firm as partnership property, and were so treated by all the members of the firm. They never did belong exclusively to E. L. Andrews. Consequently the claims of the creditors of the firm are superior to his widow's right of dower, as well as to the legal title of his heirs at law. The lands were purchased with the funds of E. L. & Z. Andrews, who were then partners, and stood upon their books as partnership property, and when the new firm was formed, composed of E. L. and Z. Andrews and Thomas G. Brown, these lands were carried into the new firm as part of its capital, and were therefore partnership property.

As to the stocks purchased with the funds of the new firm, it is very clear that they also are subject to the control and disposition of the surviving partner, Brown, notwithstanding they stand on the books of the bank and the insurance company in the name of E. L. Andrews alone. In reference to the money received by Messrs. Campbell & Chandler, growing out of the redemption of one of the lots by Mr. Gliddon, we think it should stand in the place of the lot itself,

and consequently subject to the disposition made by Brown of the lot.

We are satisfied there is no error in the decree, and it must be affirmed.

I will observe, in conclusion, that we do not intend, by anything said in the foregoing opinion, to hold that a surviving partner is authorized to sell real estate for the simple purpose of making distribution amongst the partners themselves and their representatives. That question is not raised in the case, and has not been considered. We only intend to decide this: The firm being insolvent, the surviving partner may dispose of the whole property to pay the debts, whether that property consist of real or personal estate.

The decree is affirmed.

SHANKS v. KLEIN.

(Supreme Court of the United States, 1881. 104 U. S. 18, 26 L. Ed. 635.)

MILLER, J. This is a bill in chancery, filed by John A. Klein and others against David C. Shanks, executor of the last will and testament of Joseph H. Johnston. The substance of the bill is that in the lifetime of Johnston there existed between him and Sheppard Brown a partnership, the style of which was Brown & Johnston; that their principal place of business was at Vicksburg, in the state of Mississippi, where they had a banking house; that they had branches and connections with other men in business at other places, among which was New Orleans; that they dealt largely in the purchase and sale of real estate, of which they had a large amount in value on hand at the outbreak of the recent Civil War; that this real estate was in different parcels and localities, and was bought and paid for by partnership money, and held as partnership property for the general uses of the partnership business; and that early in the war, namely, in 1863, Johnston died in the state of Virginia, where he then resided, leaving a will by which all his property, including his interest in the partnership, became vested in Shanks, who was appointed his executor.

It seems that both Brown and Johnston were absent from Mississippi and from New Orleans during the war; the one being in Virginia and the other in Georgia. Upon the cessation of hostilities, Brown returned to New Orleans, and visited Vicksburg to look after the business of the firm of Brown & Johnston and the other firms with which that was connected. Finding that suits had been commenced by creditors of the firm against him as surviving partner, and in some instances attachments levied, he became satisfied that, unless he adopted some mode of disposing of the partnership property and applying its proceeds to the payment of the debts in their just order, the whole would be wasted, or a few active creditors would

absorb it all. Under these circumstances, acting by advice of counsel, he executed a deed conveying all the property of the firm of Brown & Johnston to John A. Klein, in trust for the creditors of that partnership, and providing that the surplus, if any, should be for the use of the partners and their heirs or devisees. Klein accepted the trust, and pursuant thereto paid debts with the lands, or with the proceeds of the sale of them. * * *

It appears that, after all this property had been sold to purchasers in good faith, Shanks, as executor of Johnston's will, instituted actions of ejectment against them. They thereupon filed this bill to enjoin him from further prosecuting the actions, and compel him to convey the legal title to the real estate which came to him by the will of his testator. A decree was rendered in conformity with the prayer of the bill, and Shanks appealed. * * *

There is no doubt that in the present case all the real estate which is the subject of this controversy is to be treated as partnership property, bought and held for partnership purposes, within the rule of equity on that subject. Nor is it denied by the counsel who have so ably argued the case for the appellant that the equity of the creditors of the partnership to have their debts paid out of this property is superior to that of the devisee of Johnston. Their contention is that this right could only be enforced by proceedings in a court of justice, and that no power existed in Brown, the surviving partner, to convey the legal title vested in Shanks by the will of Johnston, nor even to make a contract for the sale of the real estate which a court will enforce against Shanks as the holder of that title. *

Counsel for the appellees, while conceding that neither the deed of Brown to Klein, nor of Klein to his vendees, conveyed the legal title of the undivided moiety which was originally in Johnston, maintain that Brown, as surviving partner, had, for the purpose of paying the debts of the partnership, power to sell and transfer the equitable interest or right of the partnership, and of both partners, in the real estate, that the trust deed which he made to Klein was effectual for that purpose, and that by Klein's sales to the other appellees they became invested with this equitable title and the right to compel Shanks to convey the legal title.

One of the learned counsel for the appellant concedes that at the present day the doctrine of the English Court of Chancery "extends to the treating of the realty as personalty for all purposes, and gives the personal representatives of the deceased partner the land as personalty, to the exclusion of the heir," and that the principle has "acquired a firm foothold in English equity jurisprudence that partnership real estate is, in fact, in all cases, and to all intents and purposes, personalty." He maintains, however, that the principle has not been carried so far in the courts of America; that the extent of the doctrine is that the creditors of the partnership and the surviving partner have a lien on the real estate of the partnership for debts due by the

firm, and for any balance found due to either partner on a final settlement of the partnership transactions; and that the right of the surviving partner, and of the creditors through him, is no more than a lien, which cannot be asserted by a sale, as if the property were personal, but to the enforcement of which a resort to a court of equity is necessary.

We think that the error which lies at the foundation of this argument is in the assumption that the equitable right of the surviving partner and the creditors is nothing but a lien.

It is not necessary to decide here that it is not a lien in the strict sense of that word; for, if it be a lien in any sense, it is also something more.

It is an equitable right, accompanied by an equitable title. It is an interest in the property which courts of chancery will recognize and support. What is that right? Not only that the court will, when necessary, see that the real estate so situated is appropriated to the satisfaction of the partnership debts, but that for that purpose and to that extent it shall be treated as personal property of the partnership, and, like other personal property, pass under the control of the surviving partner. This control extends to the right to sell it, or so much of it as may be necessary to pay the partnership debts, or to satisfy the just claims of the surviving partner.

It is beyond question that such is the doctrine of the English Court of Chancery, as stated by counsel for appellant. As this result was reached in that court without the aid of any statute, it is authority of very great weight in the inquiry as to the true equity doctrine on the subject. We think, also, that the preponderance of authority in the American courts is on the same side of the question. * * *

We are of opinion, therefore, that the purchasers from Klein acquired the equitable title of the real estate conveyed to him by Brown, and that they had a right to the aid of a court of chancery to compel Shanks to convey the legal title to the undivided half of the land, vested in him by the will of Johnston.

Decree affirmed.

BASSETT et al. v. MILLER.

(Supreme Court of Michigan, 1878. 39 Mich. 133.)

Campbell, C. J. This case presents, as we think, but one important question, and that is whether surviving partners who sell goods which belong to their firm can recover for their price in their own names, without joining the representatives of the deceased partner. The principle is well settled that the entire legal estate vests in the survivors, and no one else can be regarded as having any legal interest in the assets. Barry v. Briggs, 22 Mich. 201; Pfeffer v. Steiner, 27 Mich. 537; Merritt v. Dickey, 38 Mich. 41 The court erred in hold-

ing that the survivors could not sue for goods sold by them until they had an assignment or had formerly organized a new firm.

Judgment must be reversed, with costs, and a new trial ordered.

PFEFFER v. STEINER.

(Supreme Court of Michigan, 1873. 27 Mich. 537.)

CHRISTIANCY, C. J. The plaintiff in error, as the surviving partner of the firm of Emil Toeser & Co., brought his action in the circuit court for the county of Wayne for a trespass committed by Steiner by entering into a certain brick store in the city of Detroit, which plaintiff and his deceased partner had leased from the defendant for a term which had not yet expired.

The declaration was special, setting forth the facts of the leasing, the death of Toeser, the other member of the firm, on the 15th of March, 1872, that the firm was in possession and use of the property at the time of Toeser's death, and that plaintiff, as sole surviving partner, continued in the lawful and peaceable possession, and was so in possession at the time of the trespass, April 2, 1872.

This declaration was demurred to on the ground that the plaintiff had sued alone, and that it appeared upon the face of the declaration that the representatives of the deceased partner should have been joined as coplaintiffs. The circuit court sustained the demurrer, and the plaintiff brings the case here by writ of error.

The only ground upon which the counsel for the defendant in error relies in support of the demurrer is that as to choses in possession the surviving partner is a tenant in common with the representatives of the deceased partner, for which he cites 1 Parsons on Contracts, 202; Story on Part. § 346, and Parsons' Mercantile Law. However this may be after the partnership business has been settled and its debts fully paid, and when the representatives have been let into joint possession by the surviving partner, we think it very clear that, until the partnership has been thus settled and all the debts paid, the representatives of the deceased partner have but an equitable interest in such property, which, though in equity it may make them tenants in common, subject to the debts of the firm and a final settlement, does not constitute them tenants in common at law, and until such settlement and payment of all debts, at least, they have no right of possession, and the right of action at law for any trespass upon or injury to the property is vested solely in the surviving partner. Whether this would be so after the full settlement of the partnership and payment of debts, until such representatives should be let into joint possession, we need not decide, as this does not appear, nor is there anything in the declaration from which we can infer any such facts. All the allegations furnish an opposite inference. The demurrer is so clearly without any

basis of law for its support that it would be idle to cite authorities for our conclusion.

The circuit court erred in sustaining the demurrer, and the judgment must be reversed, with costs.

STEARNS v. HOUGHTON.

(Supreme Court of Vermont, 1866. 38 Vt. 584.)

PIERPOINT, C. J. This is an action of trover, brought to recover the value of two notes executed by one Michael Sanford.

From the facts reported by the referee it appears that prior to the 15th day of April, 1858, the plaintiff and one Goodell were copartners in the business of running a line of stages; that on the said 15th of April they sold out their line, with a part of the property they had used in the business, to said Sanford, and that the notes sued for in this action were a part of the consideration given by said Sanford for such property; that, notwithstanding these notes were taken payable to Goodell or bearer, they were the joint property of the plaintiff and said Goodell, as such copartners; that their copartnership business and accounts were never settled between themselves, or the copartnership dissolved, until it was dissolved by the death of said Goodell. When Goodell died these notes were in his possession, and afterwards went into the possession of the defendant as his administrator. Subsequently the plaintiff demanded the notes of the defendant, who refused to deliver them to him, claiming the right to hold them for the benefit of Goodell's estate.

It is an elementary principle that on the death of one copartner the right to the possession and control of the partnership effects vests in the survivor. He takes them, subject to the right and duty of settling and closing up the copartnership affairs. He alone has the right of disposing of the property and of collecting and paying the debts. All actions to enforce the claims of the company must be brought in his name as survivor. The right of the survivor to the copartnership effects does not in any respect depend upon the question whether or not, upon a settlement of the business, there will be funds in his hands belonging to the estate of the deceased copartner. If the company is solvent, there necessarily will be.

If the representative of the deceased partner has reason to fear that the copartnership funds will be misapplied or squandered, the aid of the court of chancery may be invoked to prevent such a result; but a court of law has no power to interfere in that respect.

It is insisted that the plaintiff ought not to recover, because the said Goodell had agreed that whatever he owed to said Sanford might be applied upon said notes. What might have been the effect if the application had actually been made in Goodell's lifetime, it is not neces-

sary now to determine. It was an agreement to apply the company effects in payment of his individual debt; but, not having been carried out by Goodell, it is quite clear that the survivor is not bound by the arrangement. * * *

Upon examining carefully the report of the referee, we are unable to find therein any sufficient reason why the plaintiff is not entitled to recover.

The pro forma judgment of the county court is reversed, and judgment rendered for the plaintiff for the amount reported by the referee, with interest thereon and his cost.

ADAMS v. HACKETT.

(Supreme Court of New Hampshire, 1853. 27 N. H. 289, 59 Am. Dec. 376.)

EASTMAN, J. As we understand the declaration in this case, it is founded upon promises made to the plaintiff as surviving partner of the firm of J. G. Bancroft & Co., and as surviving partner of the firm of G. A. & J. Q. Adams, and also upon promises to the plaintiff in his individual capacity. And the objection is taken by the defendant that these are different causes of action, which cannot be joined in one suit.

We suppose the objection is, not that the causes of action are of a different nature, and therefore cannot be joined, but that they accrue in different rights; that is, that here is a cause of action in favor of the firm of J. G. Bancroft & Co., and another in favor of G. A. & J. Q. Adams, and still another in favor of George A. Adams individually, and that the three cannot be united in one suit.

It is not disputed that the plaintiff is the surviving partner of the two firms, and it is well settled that where a firm consists of two persons, and one of them dies, the rights of action which were vested in the firm survive to the remaining member; not to him as to an administrator or executor, representing another person, but as the survivor of the partnership representing himself, and being all that is left of the firm. The cause of action is in him; and hence it has been often held that, in an action at the suit of a surviving partner, he may include a count for a debt due to himself in his own right, as both causes of action are in him. Slipper v. Stidstone, 5 T. R. 493; French v. Andrade, 6 Id. 582; Golding v. Vaughan, 2 Chit. 436; Richards v. Heather, 1 Barn. & Ald. 29; Smith v. Barrow, 2 T. R. 476.

On the death of one of two or more joint obligees, promisees, etc., the action must be brought by the survivor, or, if there be more than one, by all the survivors. Martin v. Krump, 2 Salk. 444; Kemp v. Andrews, Carth. 170; Wilton v. Hamilton, 1 Bos. & Pul. 445; Cabell v. Vaughan, 1 Saund. 291, note 4. The remedy at law survives entire to the surviving obligee or promisee, who receives the share of the

deceased in the avails of the suit as trustee to his personal representatives, and must account for it with them. Martin v. Crompe, 1 Ld. Raym. 340; West v. Skip, 1 Ves. Sr. 242; Id. 456; Toller on Executors, 155, 163, 444.

As it is clear, upon authority, that a surviving partner may, in an action brought by him as such survivor, include in his declaration a count for a debt due to himself in his own right, no reason occurs to us why he may not also, in the same suit, join another count for a debt accruing to him as survivor of another firm. The causes of action are all in him, and the principle in the one case must be the same as in the other. This objection of the defendant must therefore fail. * * *

Judgment for the plaintiff.

VALENTINE et al. v. WYSOR.

(Supreme Court of Indiana, 1890. 123 Ind. 47, 23 N. E. 1076, 7 L. R. A. 788.)

MITCHELL, J. This suit was instituted by Emily E. Valentine, Martha M. Little, Parmelia R. Gilbert, Mary E. Wood, and Florence T. Howe, the children and heirs at law of John Jack, late of Delaware county, deceased, against Jacob H. Wysor. The questions for decision arise upon the complaint, from which we summarize the following facts: John Jack, father of the plaintiffs below, died testate in the month of October, 1859. At and before that date, he was in partnership with the defendant, Jacob H. Wysor, the two composing the firm of Wysor & Jack. The testator was also a member of the firm of Wysor, Jack & Kline, which was composed of the above-named Jacob H. Wysor, John Jack, and William B. Kline. This last-named firm was engaged in the milling business, and owned a flouring mill. together with 65 acres of land adjacent; each member being the owner of an undivided one-third of the business and property. The business of the firm of Wysor, Jack & Kline was in no way connected with that of Wysor & Jack; the last-named firm being the owner of 380 acres of land, which constituted part of the firm assets, in which each partner had an equal interest. The character of the business of Wysor & Jack does not distinctly appear, but the land owned by them is treated by both parties as partnership property. By the first, second, and third clauses of his will, the testator appointed executors to carry the will into execution, made provision for his wife by giving her a life estate in his real estate, and expressed a desire that she should be admitted into the firm, and continue the business as a partner with Wysor and Kline, his former associates in the milling business. The fourth and fifth clauses of his will read as follows: [The executors are authorized to adjust all debts due to and from the testator, to settle with testator's partners all firm affairs, and to sell so much of testator's real and personal estate, in such manner as the executors think best,

to satisfy all debts against the estate.] As to the remainder of his property, after the termination of the life estate of the widow, the testator died intestate. After the testator died, Wysor, as surviving partner of the firm of Wysor & Jack, and Wysor and Kline, as surviving partners of Wysor, Jack & Kline, continued in possession of the property of their respective firms until June 25, 1866, when the executors of the last will of John Jack, assuming to act under the provisions of the fourth and fifth clauses of the will, above set out, made a settlement, and entered into an agreement with the defendant, Wysor, whereby, in consideration that the latter agreed to pay the indebtedness of the firm of Wysor & Jack, and certain debts due from the testator to Wysor, and also to pay his share of all the unpaid indebtedness of Wysor, Jack & Kline, and all other indebtedness of the testator, including the cost of administration, and, in addition, convey certain property to the widow, and secure to her one-third interest in the property of Wysor, Jack & Kline, free from any debts, the executors and widow agreed to convey to the defendant, Wysor, all the interest of the testator, excepting certain designated parcels, in the real estate owned by the firm of Wysor & Jack. This agreement was consummated, and conveyances were made, accordingly, by the widow and executors, in June, 1866; and it is charged that the defendant claims, in virtue of these conveyances, to be the sole owner of the property, and denies the title of the plaintiffs. These conveyances stood without question until in February, 1880, when this suit was instituted.

It does not appear from the complaint that there was any disparity between the value of the property conveyed and the amount of debts assumed, or that the debts have not been paid according to the agreement, or that there was any fraud or collusion between the surviving partner and the executors, or that the latter were in any way overreached. It is claimed, however, that the power of sale contained in the will did not extend to the partnership real estate, except that specifically mentioned therein; that, if it did, it only authorized the executors to sell the testator's interest in so much thereof as remained after full payment of the partnership debts. Moreover, it is claimed that, even if the executors had authority to sell, the transaction, as disclosed by the complaint, was not a sale, within the meaning of the language employed in the will, and that, because the sale was made by the executors without having given notice of the time, place, and terms of sale, and without having included the value of the real estate in the bond given by them when they qualified, the conveyance was invalid and void. It is claimed, too, that Wysor, being the surviving partner of the firm of Wysor & Jack, was a trustee of the partnership property, under a duty to the heirs and creditors, and that he was therefore incompetent to purchase and receive a conveyance from the executors. For all these reasons, it is urged that the conveyance is illegal, and ought to be set aside, and that an accounting of the affairs of the firm of Wysor &

Jack should be had; the appellants alleging their readiness to pay whatever may be found due the defendant, Wysor.

While it is undoubtedly true, as a general rule, that an action to compel a surviving partner to account can only be maintained by the personal representative of the deceased partner, yet circumstances may appear which create an exception to the general rule, and make it proper that a court of equity should entertain an action, on behalf of the heirs. Where it is shown that there is a collusion between the surviving partner and the executor, the latter refusing to compel an accounting by the former, or where there has been such dealings between the two as renders it probable that the executor will not make a bona fide effort to secure an accounting, or other like circumstances appear, it has been held that the heirs may maintain the action. In the absence of special circumstances, heirs have no locus standi against the surviving partner. 2 Lindl. Partn. 494; Harrison v. Righter, 11 N. J. Eq. 389; Hyer v. Burdett, 1 Edw. Ch. (N. Y.) 325.

Assuming, without deciding, that the facts, as pleaded in the present case, make it apparent that the executors have placed themselves in such an attitude towards the surviving partner, and the transaction sought to be set aside, as to bring the case within the exception, it becomes pertinent to inquire whether or not the appellants, as heirs, show any interest in the property of the late firm of Wysor & Jack upon which to predicate an action. If the executors had no power under the will to sell and convey, or the surviving partner was incompetent to purchase, or receive a conveyance, or if, for any of the other reasons urged, the transaction between the executors and the surviving partner was illegal, and the conveyance void, then the property remained in the possession, and under the qualified ownership, of the surviving partner, unaffected by what transpired. It is familiar law that a surviving partner has the right to the control and possession of the property of the firm, and that he may dispose of it in order to adjust the partnership accounts, and is only liable to the representatives of the deceased partner for what remains in his hands after the partnership affairs are settled; and there is nothing more thoroughly settled in the law of partnership than that the rights of the heirs of a deceased partner are subject to the adjustment of all claims between the partners, and attach only to the surplus which remains when the partnership debts are all paid, and the affairs of the firm wound up. Until all the debts are paid the rights of the heirs do not attach. Grissom v. Moore, 106 Ind. 296, 6 N. E. 629, 55 Am. Rep. 742, and cases cited; Walling v. Burgess, 122 Ind. 299, 22 N. E. 419, 23 N. E. 1076, 7 L. R. A. 481; Deeter v. Sellers, 102 Ind. 458, 1 N. E. 854. The heirs of a deceased partner have no interest, as such, in the property of the firm. Their only remedy is to compel the surviving partner to account for the surplus after the settlement of all the partnership liabilities; and, ordinarily, a court of equity will not entertain jurisdiction of the affairs of a partnership until by

its decree a final adjustment of the business can be effected. Thompson v. Lowe, 111 Ind. 272, 12 N. E. 476, and cases cited; Scott v. Searles, 5 Smedes & M. (Miss.) 25; Rossum v. Sinker, 12 Cent. Law J. 205, and note. Now, while it appears that the deceased partner was indebted to the firm, and that the firm was indebted on partnership account, and that the surviving partner agreed, in consideration of the conveyance which is assailed, to pay these and other debts for which the testator's estate was liable, and while it may be inferred from the facts alleged in the complaint that the surviving partner has paid all the debts of the firm except what remains due to himself on the partnership account, it nowhere appears that the entire interest of the deceased partner would not be absorbed in the adjustment of the partnership account with the surviving partner. Having averred facts from which the inference arises that the surviving partner has paid all the partnership debts, and that the estate of the deceased partner is indebted to him, it is essential to the right of the heirs to call him to account that they make it appear that he has in his hands partnership property in excess of the amount required to reimburse himself. The averments in the complaint wholly fail to do this, and the conclusion is therefore unavoidable that the complainants fail to show such an interest in the property as entitles them to invoke the aid of a court of equity. This conclusion necessarily follows from the application of the rule that a surviving partner is entitled to the custody and management of the assets, unless it be shown that he is committing waste, or otherwise mismanaging the affairs of the firm, and is only liable to the heirs or representatives of the deceased partner for what remains after everything is settled up. Roys v. Vilas, 18 Wis. 169; Shanks v. Klein, 13 Cent. Law J. 369; Anderson v. Ackerman, 88 Ind. 481; Cobble v. Tomlinson, 50 Ind. 550. * * *

This brings us to inquire whether the surviving partner occupied such a relation to the property, and to those concerned, as to disqualify him from purchasing the interest from the executors of the deceased partner. It is not to be doubted that a surviving partner is regarded as a trustee, primarily for the creditors of the firm, and, secondarily, for the heirs or personal representatives of the deceased partner in all that remains, or fairly ought to remain, after adjusting the partnership account. Accordingly, it has been correctly laid down that "the surviving partners are held strictly as trustees, and their conduct in discharging their trust is carefully looked after, by courts of equity. Thus, like other trustees, they cannot sell the property of the firm, and buy it themselves; nor, as the converse of this, can they buy from themselves property for the firm. Their trust being to wind up the concern, their powers are commensurate with the trust. * * * Their trust is to wind up the concern in the best manner for all interested, and therefore without unnecessary delay." Pars. Partn. 442; Case v. Abeel, 1 Paige (N. Y.) 393; Sigourney v. Munn, 7 Conn. 11; Jones v. Dexter, 130 Mass. 380, 39 Am. Rep. 459. Being in a

sense a trustee, the surviving partner cannot, of course, speculate upon the property which the law commits to his custody, solely for his own advantage, in disregard of the interest of his cestuis que trustent; and, if he makes profits out of the trust property, in the course of the adjustment of the affairs of the partnership, he is held to account to those interested for their share. He cannot purchase the trust property from himself, no matter whether the attempt be made by means of a public or private sale. This is so, not only because his duty as seller, and his interest as purchaser, are in irreconcilable conflict, but for the more cogent reason that it is indispensable to every legal contract of sale and purchase that there be two contracting parties competent to enter into a binding engagement with each other. Hence, an attempt by a trustee who holds property in trust, whether he be surviving partner, administrator, or whatever his designation, to sell the trust estate to himself, is everywhere held to be void. Martin v. Wyncoop, 12 Ind. 266, 74 Am. Dec. 209; Hunsucker v. Smith, 49 Ind. 118; Murphy v. Teter, 56 Ind. 545; Rochester v. Levering, 104 Ind. 562, 4 N. E. 203; Nelson v. Hayner, 66 Ill. 487. In the case of a sale thus made or attempted, it can well be said, it is of no avail to show that the trustee acted in good faith. Such transactions are poisonous in their tendencies, and violative of the principles of public policy. They are declared void, not for the purpose of affording a remedy against actual mischief, but to prevent the possibility of wrong. Potter v. Smith, 36 Ind. 231; Morgan v. Wattles, 69 Ind. 261. These principles do not apply or control in the case of a sale made by the personal representative of a deceased partner to a surviving partner. No good reason can be suggested why a surviving partner should be held legally incompetent and absolutely disqualified from becoming the purchaser of the interest of his deceased partner in the partnership business from his properly authorized legal representative, while very many reasons occur why such transactions, fairly entered into, should not only be upheld, but encouraged. In addition, the adjudged cases firmly support the right to make such sales. Brown v. Slee, 103 U. S. 828, 26 L. Ed. 618; Baird v. Baird, 21 N. C. 524, 31 Am. Dec. 399; Chambers v. Howell, 11 Beav. 6; Roys v. Vilas, supra. In Kimball v. Lincoln, 99 Ill. 578, after reiterating the rule that a surviving partner could not become a purchaser of the firm property at his own sale, nor from a co-trustee, the court said: "But the reason that would forbid a transaction of this character has no application to a case where a surviving partner purchases property from the executor or administrator of the deceased partner, and hence the rule which would govern the one case cannot control the other." See Ludlow's Heirs v. Cooper's Devisees, 4 Ohio St. 1. It has thus been seen that the executors had plenary power to make settlement of the partnership account, and to sell and convey the real and personal estate of the testator at their discretion, and that the surviving partner was competent to negotiate a settlement of the

affairs of the firm, and to purchase the interest of his deceased partner. * * *

Judgment for defendant affirmed.[1]

[1] In Knox v. Gye, L. R. 5 H. L. 656 (1872), in holding that an action by the executor of the deceased partner against the surviving partner was barred by the statute of limitations, Lord Westbury said: "In deciding this case, it must be recollected that the representative of a deceased partner has no specific interest in or claim upon any particular part of the partnership estate. The whole property therein accrues to the surviving partner; and he is the owner thereof, both at law and in equity. The right of the deceased partner's representative consists in having an account of the property, of its collection and application, and in receiving that portion of the clear balance that accrues to the deceased's share and interest in the partnership. Another source of error in this matter is the looseness with which the word 'trustee' is frequently used. The surviving partner is often called a 'trustee'; but the term is used inaccurately. He is not a trustee, either expressly or by implication. On the death of a partner, the law confers on his representatives certain rights as against the surviving partner, and imposes on the latter correspondent obligations. The surviving partner may be called, so far as these obligations extend, a trustee for the deceased partner; but, when these obligations have been fulfilled, or are discharged, or terminate by law, the supposed trust is at an end. * * * In like manner here the surviving partner may be called a trustee for the dead man; but the trust is limited to the discharge of the obligation, which is liable to be barred by lapse of time. As between the express trustee and the cestui que trust, time will not run; but the surviving partner is not a trustee in that full and proper sense of the word. * * * There is nothing fiduciary between the surviving partner and the dead partner's representative, except that they may respectively sue each other in equity. There are certain legal rights and duties which attach to them; but it is a mistake to apply the word 'trust' to the legal relation which is thereby created."

The English partnership act of 1890 (section 43) provides: "Subject to any agreement between the partners, the amount due from surviving or continuing partners to an outgoing partner or the representatives of a deceased partner in respect of the outgoing or deceased partner's share is a debt accruing at the date of the dissolution or death."

CHAPTER IV.

THE NATURE, EXTENT, AND DURATION OF PARTNERSHIP LIABILITY.

SECTION 1.—NATURE OF LIABILITY IN CONTRACT.

I. Characteristics of Joint Obligations.

MASON v. ELDRED et al.

(Supreme Court of the United States, 1867. 6 Wall. 231, 18 L. Ed. 783.)

On certificate of division between the judges of the Circuit Court of Wisconsin. The plaintiff, Mason, sued in the Circuit Court for Wisconsin Anson Eldred, Elisha Eldred, and one Balcom, trading as partners, upon a partnership note of theirs. Process was served on Anson Eldred alone, who alone appeared and pleaded non assumpsit. On the trial, the note being put in evidence by the plaintiff, Eldred offered the record of a judgment in one of the state courts of Michigan, showing that Mason had already brought suit in that court on the same note against the partnership, where, though Elisha Eldred was alone served and alone appeared, judgment in form had been passed against all the defendants for the full amount due upon the note. The evidence being objected to by the plaintiff, because not admissible under the pleadings, and because it appeared on the face of the record that there was no judgment against either of the defendants named, except Elisha Eldred, who alone, as appeared also, was served or appeared, and because it was insufficient to bar the plaintiff's action, the question whether it was evidence under the issue in bar of, and to defeat, recovery against Anson Eldred, was certified to this court for decision as one on which the judges of the Circuit Court were opposed.

Field, J. The counsel of the plaintiff suggests that the question presented by the certificate of the judges of the Circuit Court is divisible into two parts: (1) Whether the record of the judgment recovered in Michigan was admissible under the pleadings; and (2) whether, if admissible, the judgment constituted a bar to the present action. We think, however, that the admissibility of the record depends upon the operation of the judgment.

If the note in suit was merged in the judgment, then the judgment

is a bar to the action, and an exemplification of its record is admissible; for it has long been settled that under the pleas of the general issue in assumpsit evidence may be received to show, not merely that the alleged cause of action never existed, but also to show that it did not subsist at the commencement of the suit. Young v. Black, 7 Cranch, 565, 3 L. Ed. 440; Young v. Rummell, 2 Hill (N. Y.) 480, 38 Am. Dec. 594. On the other hand, if the note is not thus merged, it still forms a subsisting cause of action, and the judgment is immaterial and irrelevant.

The question, then, for determination, relates to the operation of the judgment upon the note in suit.

The plaintiff contends that a copartnership note is the several obligation of each copartner, as well as the joint obligation of all, and that a judgment recovered upon the note against one copartner is not a bar to a suit upon the same note against another copartner; and the latter position is insisted upon as the rule of the common law, independent of the joint debtor act of Michigan.

It is true that each copartner is bound for the entire amount due on copartnership contracts, and that this obligation is so far several that, if he is sued alone and does not plead the nonjoinder of his copartners, a recovery may be had against him for the whole amount due upon the contract and a joint judgment against the copartners may be enforced against the property of each. But this is a different thing from the liability which arises from a joint and several contract. There the contract contains distinct engagements, that of each contractor individually, and that of all jointly, and different remedies may be pursued upon each. The contractors may be sued separately on their several engagements, or together on their joint undertaking. But in copartnerships there is no such several liability of the copartners. The copartnerships are formed for joint purposes. The members undertake joint enterprises, they assume joint risks, and they incur in all cases joint liabilities. In all copartnership transactions this common risk and liability exists. Therefore it is that in suits upon these transactions all the copartners must be brought in, except when there is some ground of personal release from liability, as infancy or a discharge in bankruptcy; and, if not brought in, the omission may be pleaded in abatement. The plea in abatement avers that the alleged promises upon which the action is brought were made jointly with another, and not with the defendant alone,—a plea which would be without meaning, if the copartnership contract was the several contract of each copartner.

The language of Lord Mansfield in giving the judgment of the King's Bench in Rice v. Shute, Burr. 2511, "that all contracts with partners are joint and several, and every partner is liable to pay the whole," must be read in connection with the facts of the case, and, when thus read, does not warrant the conclusion that the court intended to hold a copartnership contract the several contract of each

copartner, as well as the joint contract of all the copartners, in the sense in which these terms are understood by the plaintiff's counsel, but only that the obligation of each copartner was so far several that in a suit against him judgment would pass for the whole demand, if the nonjoinder of his copartners was not pleaded in abatement.

The plea itself, which, as the court decided, must be interposed in such cases, is inconsistent with the hypothesis of a several liability.

For the support of the second position, that a judgment against one copartner on a copartnership note does not constitute a bar to a suit upon the same note against another copartner, the plaintiff relies upon the case of Sheehy v. Mandeville & Jamesson, decided by this court, and reported in 6 Cranch, 254, 3 L. Ed. 215. In that case the plaintiff brought a suit upon a promissory note given by Jamesson for a copartnership debt of himself and Mandeville. A previous suit had been brought upon the same note against Jamesson alone, and judgment recovered. To the second suit against the two copartners the judgment in the first action was pleaded by the defendant Mandeville, and the court held that it constituted no bar to the second action, and sustained a demurrer to the plea.

The decision in this case has never received the entire approbation of the profession, and its correctness has been doubted and its authority disregarded in numerous instances by the highest tribunals of different states. It was elaborately reviewed by the Supreme Court of New York in the case of Robertson v. Smith, 18 Johns. 459, 9 Am. Dec. 227, where its reasoning was declared unsatisfactory, and a judgment rendered in direct conflict with its adjudication.

In the Supreme Court of Massachusetts a ruling similar to that of Robertson v. Smith was made. Ward v. Johnson, 13 Mass. 148. In Wann v. McNulty, 2 Gilman, 359, 43 Am. Dec. 58, the Supreme Court of Illinois commented upon the case of Sheehy v. Mandeville and declined to follow it as authority. The court observed that, notwithstanding the respect which it felt for the opinions of the Supreme Court of the United States, it was well satisfied that the rule adopted by the several state courts—referring to those of New York, Massachusetts, Maryland, and Indiana—was more consistent with the principles of law and was supported by better reasons.

In Smith v. Black, 9 Serg. & R. 142, 11 Am. Dec. 686, the Supreme Court of Pennsylvania held that a judgment recovered against one of two partners was a bar to a subsequent suit against both, though the new defendant was a dormant partner at the time of the contract and was not discovered until after the judgment. "No principle," said the court, "is better settled than that a judgment once rendered absorbs and merges the whole cause of action, and that neither the matter nor the parties can be severed, unless, indeed, where the cause of action is joint and several, which, certainly, actions against partners are not." In its opinion the court referred to Sheehy v. Mandeville, and remarked that the decision in that case, however much entitled to respect from

the character of the judges who composed the Supreme Court of the United States, was not of binding authority, and it was disregarded.

In King v. Hoare, 13 Mees. & W. 495, the question whether a judgment recovered against one of two joint contractors was a bar to an action against the other was presented to the Court of Exchequer and was elaborately considered. The principal authorities were reviewed, and the conclusion reached that by the judgment recovered the original demand had passed in rem judicatam and could not be made the subject of another action. In the course of the argument the case of Sheehy v. Mandeville was referred to as opposed to the conclusion reached, and the court observed that it had the greatest respect for any decision of Chief Justice Marshall, but that the reasoning attributed to him in the report of that case was not satisfactory. Mr. Justice Story, in Trafton v. United States, 3 Story, 651, Fed. Cas. No. 14,135, refers to this case in the Exchequer, and to that of Sheehy v. Mandeville, and observes that in the first case the Court of Exchequer pronounced what seemed to him a very sound and satisfactory judgment, and as to the decision in the latter case that he had for years entertained great doubts of its propriety.

The general doctrine maintained in England and the United States may be briefly stated. A judgment against one upon a joint contract of several persons bars an action against the others, though the latter were dormant partners of the defendant in the original action, and this fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation. They cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause.

If, therefore, the common-law rule were to govern the decision of this case, we should feel obliged, notwithstanding Sheehy v. Mandeville, to hold that the promissory note was merged in the judgment of the court of Michigan, and that the judgment would be a bar to the present action. But by a statute of that state (2 Comp. Laws Mich. 1857, p. 1219, c. 133), the rule of the common law is changed with respect to judgments upon demands of joint debtors, when some only of the parties are served with process. The statute enacts that "in actions against two or more persons jointly indebted upon any joint obligation, contract, or liability, if the process against all of the defendants shall have been duly served upon either of them, the defendant so served shall answer to the plaintiff, and in such case the judgment, if rendered in favor of the plaintiff, shall be against all the defendants in the same manner as if all had been served with process," and that "such judgment shall be conclusive evidence of the liabilities

of the defendant who was served with process in the suit, or who appeared therein; but against every other defendant it shall be evidence only of the extent of the plaintiff's demand, after the liability of such defendant shall have been established by other evidence."

Judgments in cases of this kind against the parties not served with process, or who do not appear therein, have no binding force upon them personally. The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded. D'Arcy v. Ketchum, 1 How. 165, 13 L. Ed. 648. Nor is the demand against the parties not sued merged in the judgment against the party brought into court. The statute declares what the effect of the judgment against him shall be with respect to them. It shall only be evidence of the extent of the plaintiff's demand after their liability is by other evidence established. It is entirely within the power of the state to limit the operation of the judgment thus recovered. The state can as well modify the consequences of a judgment in respect to its effect as a merger and extinguishment of the original demand as it can modify the operation of the judgment in any other particular.

A similar statute exists in the state of New York, and the highest tribunals of New York and Michigan, in construing these statutes, have held, notwithstanding the special proceedings which they authorize against the parties not served to bring them afterward before the court, if found within the state, that such parties may be sued upon the original demand.

In Bonesteel v. Todd, 9 Mich. 379, 80 Am. Dec. 90, an action of covenant was brought against two parties to recover rent reserved upon a lease. One of them was alone served with process, and he appeared and pleaded the general issue, and on the trial, as in the case at bar, produced the record of a judgment recovered against himself and his codefendant under the joint debtor act of New York; process in that state having been served upon his codefendant alone. The court below held the judgment to be a bar to the action. On error to the Supreme Court of the state this ruling was held to be erroneous. After referring to decisions in New York, the court said: "No one has ever doubted the continuing liability of all parties. We cannot, therefore, regard the liability as extinguished; and inasmuch as the new action must be based upon the original claim, while, as in the case of foreign judgments at common law, it may be of no great importance whether the action may be brought in form upon the judgment, or on the previous debt, it is certainly more in harmony with our practice to resort to the form of action appropriate to the real demand in controversy. While we do not decide an action in form on the judgment to be inadmissible, we think the action on the contract the better remedy to be pursued."

In Oakey v. Aspinwall, 4 Comst. 513, the Court of Appeals of New York had occasion to consider the effect of a judgment recovered under the joint debtor act of that state upon the original demand. Mr. Justice Bronson, speaking for the court, says: "It is said that the original demand was merged in and extinguished by the judgment, and consequently that the plaintiff must sue upon the judgment, if he sues at all. That would undoubtedly be so, if both the defendants had been before the court in the original action. But the joint debtor act creates an anomaly in the law; and for the purpose of giving effect to the statute, and at the same time preserving the rights of all parties, the plaintiff must be allowed to sue on the original demand. There is no difficulty in pursuing such a course. It can work no injury to any one, and it will avoid the absurdity of allowing a party to sue on a pretended cause of action, which is, in truth, no cause of action at all, and then to recover on proof of a different demand."

Following these authorities, and giving the judgment recovered in Michigan the same effect and operation that it would have in that state, we answer the question presented in the certificate that the exemplification of the record of the judgment recovered against the defendant Elisha Eldred, offered by the defendant Anson Eldred, is not admissible in evidence in bar of, and to defeat, a recovery against the latter.[1]

NORTHERN INSURANCE COMPANY v. POTTER.

(Supreme Court of California, 1883. 63 Cal. 157.)

McKinstry, J. The defendant, Julius Jacobs, and George Easton were copartners doing business as insurance agents, and as such were agents of plaintiff. In March, 1879, an account was stated between plaintiff and defendant, Jacobs, and Easton, by which a balance of $2,359.02 was found due from the three to plaintiff.

In September, 1879, Jacobs and Easton paid to plaintiff on account of such balance $1,800. At the time of the payment plaintiff released Jacobs and Easton from all further claim or liability with respect to the indebtedness of them and defendant, but it was particu-

[1] "In most of the states legislative acts have been passed, called 'joint debtor acts,' which, as a substitute for outlawry, provide that if process be issued against several joint debtors or partners, and served on one or more of them, and the others cannot be found, the plaintiff may proceed against those served, and, if successful, have judgment against all. Various effects and consequences are attributed to such judgments in the states in which they are rendered. They generally are held to bind the common property of the joint debtors, as well as the separate property of those served with process, when such property is situated in the state, but not the separate property of those not served; and, whilst they are binding personally on the former, they are regarded as either not personally binding at all, or only prima facie binding on the latter." Hall et al. v. Lanning et al., 91 U. S. 160, 168, 23 L. Ed. 271 (1875).

larly specified and agreed by and between plaintiff and Jacobs and Easton that the release should not operate or be construed to release or discharge the defendant.

This action is to recover of defendant the part of the said balance $2,359.02 unpaid by Jacobs and Easton. The partners were joint debtors. Civ. Code, § 2442. Section 1543 of the same Code provides: "A release of one of two or more joint debtors does not extinguish the obligations of any of the others, unless they are mere guarantors; nor does it affect their right to contribution from him." Independent of the Code, the release of Jacobs and Easton would not have discharged the defendant, because it was expressly provided by the parties to it that it should not have that effect.

In Solly v. Forbes, cited and approved by Wilde, C. J., in Thompson v. Lack, 3 Com. B. 551, it was authoritatively decided that a release of a joint debtor or surety might be qualified and prevented from operating a release of a codebtor or surety. And Patterson, J., North v. Wakefield, 13 Q. B. 541, said: "Now the deed contained an express clause that the release to Goddard should not operate to discharge any one jointly or otherwise liable to plaintiff for the same debts. It is plain, therefore, that it did not release the defendant. The reason why a release to one debtor releases all jointly liable is, unless it be held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released; but that reason does not apply when the debtor released agrees to such a qualification of the release as will leave him liable to the rights of the co-debtor."

As the debtors released in the case before us agreed to the continuation of the right of contribution on the part of the defendant, the latter was not discharged.

Section 1543 of the Civil Code seems to give the same effect to a release in general terms as was given by the English courts to the qualified release, expressly providing that the joint debtors not mentioned in the release should not be discharged. The section provides in effect that the joint debtor who accepts a release shall be held to have consented that the liability of his joint debtor should be continued, together with his own liability to contribution. It is enough for the present case, however, to decide that defendant was not discharged by the release of Jacobs and Easton.

Judgment affirmed.

II. Partnership Liability and Joint Liability.

WHELAN v. SHAIN et al.

(Supreme Court of California, 1896. 115 Cal. 326, 47 Pac. 57.)

Action by R. I. Whelan, sheriff, to determine the rights of Joseph E. Shain and J. S. Reid as claimants of a fund arising from execution sale. From a judgment in favor of the defendant Reid, the defendant Shain appeals.

Belcher, C. On January 5, 1895, the defendant Joseph E. Shain commenced an action against William Binz and L. Martella upon their joint promissory note, signed: "Wm. Binz. L. Martella"—and caused to be attached certain personal property belonging to a copartnership of which they were the only members. On January 16, 1895, judgment was entered in the action that he "have and recover from L. Martella and William Binz, defendants," the sum of $1,410.60, as prayed for. On January 8, 1895, the defendant J. S. Reid commenced an action against the same defendants as copartners, doing business under the firm name of Binz & Martella, upon certain partnership obligations, and caused to be attached the same property that had been attached by Shain. On January 22, 1895, judgment was entered that he "have and recover from William Binz and Lawrence Martella, copartners," the sum of $986.48, as prayed for. Under executions issued on both of the said judgments the plaintiff, Whelan, as sheriff, sold the said attached property for the sum of $1,200, and, after deducting his proper fees and charges, there was left in his hands the sum of $1,059. Shain and Reid each claimed and demanded of the plaintiff that the proceeds of the said sale be applied in satisfaction of his judgment, and the plaintiff, being uncertain as to how the money should be applied, commenced this action, setting forth the facts, and asking that the defendants be required to interplead and set up their respective rights to the money in his possession, and that the matter be determined by the court. And subsequently, with the consent of the parties and under an order of court, plaintiff paid the money into court. The defendants answered the complaint, each setting up his claim and right to the money as against his codefendant. Upon the issues thus framed the case was tried, it being admitted, during the trial, that the property sold was the partnership property of Binz & Martella. The court found the facts and gave judgment in favor of defendant Reid, from which judgment and an order denying his motion for a new trial defendant Shain appeals.

The law is well settled in this state that partnership property must first be applied to the payment of partnership debts. "The debts of a partnership must be discharged from the joint property before any portion of it can be applied to the individual debts of the partners." Chase v. Steel, 9 Cal. 64. "The fact that an individual creditor ob-

tains judgment, issues execution, and levies on firm property, gives him no right to the property as against firm creditors who have not obtained judgment.'" Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605. "It has been repeatedly decided by this court that the creditors of a partnership are entitled to a preference over the creditors of the individual partners in the payment of their debts out of the partnership property, or moneys arising therefrom, without regard to the priority of attachment liens." Bullock v. Hubbard, 23 Cal. 501, 83 Am. Dec. 130. And see, also, Jones v. Parsons, 25 Cal. 100; Robinson v. Tevis, 38 Cal. 611; California Furniture Co. v. Halsey, 54 Cal. 315, and Commercial Bank v. Mitchell, 58 Cal. 42. In his answer Shain alleged, on his information and belief, in substance, that the note on which he obtained judgment was executed by Binz & Martella as copartners, and was a partnership contract and obligation, and that the money received thereon from the payee was invested and used in and about the partnership business, and in furtherance of its objects. The court, however, found against him on this issue, to the effect that the said note was not executed by Binz & Martella as copartners and was not a partnership obligation, and that the money obtained thereon was not invested or used in or about the said partnership business, or in furtherance of its objects, "but that the obligation to pay said sum was the obligation of William Binz and L. Martella as individuals, and not otherwise." There was evidence tending to support this finding; but, if it were otherwise, under the law laid down in Bank v. Mitchell, supra, the result would not be changed. The court below was right, therefore, in adjudging that respondent Reid was entitled to have the said money first applied to the payment of his judgment. The judgment and order appealed from should be affirmed.

CITIZENS' BANK OF PERRY v. WILLIAMS et al.

(Court of Appeals of New York, 1891. 128 N. Y. 77, 28 N. E. 33, 26 Am. St. Rep. 454.)

Earl, J. The defendants were copartners in the mercantile business at Perry, Wyoming county, under the firm name of Williams & Co., and in their firm name they executed a note to the plaintiff for borrowed money. It commenced this action, and obtained an attachment against them on the ground that they had assigned their property with intent to defraud their creditors. They made a motion to set aside the attachment, based upon the same papers upon which it was granted, and the motion was denied at the Special Term, and the decision there was affirmed at the General Term, and then the defendants appealed to this court. The allegation of fraud against the defendants is based upon the following facts: At the time the defendants became partners, Helen A. Williams owed E. M. Clark about

$800, and for that indebtedness they gave him their two joint and several promissory notes, signed by them. L. Sophia Williams, however, signed the notes simply as surety for Helen A. Williams, who was and remained the principal debtor. Thereafter, in February, 1890, the defendants having become insolvent both as a firm and as individuals, executed a general assignment of all their firm and individual property for the benefit of their creditors, in which they directed the two notes held by Clark to be paid out of the proceeds of the firm property; and the fraud alleged by the plaintiff consists in this direction the claim being that the notes were not firm debts, but the individual debts of Helen A. Williams, for which L. Sophia Williams was only surety, and that, therefore, it was necessarily a fraud in law upon the firm creditors to appropriate the proceeds of firm property for their payment. We think the learned courts below fell into error in granting and upholding the attachment upon the grounds specified. These notes were joint debts of the defendants for which they were jointly liable to Clark, and it was therefore not a fraud to appropriate their joint property for their payment. Clark could have recovered a judgment upon the notes against the defendants, and could, by execution, have seized the firm property to satisfy the judgment, and a purchaser at the execution sale would have obtained a full and absolute title to the firm property purchased. Although the defendants were insolvent, they could have paid these debts either in money or in property belonging to the firm, and in so doing they would have perpetrated no fraud upon their creditors. As they could thus pay the debts, either with firm money or firm property, we cannot perceive why they could not, through an assignee, direct the same debts to be paid out of the proceeds of the firm property. It certainly cannot be a fraud upon firm creditors to apply firm property to the payment of debts for the satisfaction of which such property could be taken. It is a mistake to suppose that the firm property is now in the hands of a court of equity for distribution and application upon equitable principles. No suit whatever is pending in equity, and no application has been made to a court of equity in reference to the firm property. The defendants have made an assignment of their firm property authorized by law, and the assignee is to dispose of it, not in accordance with the directions of any court, but in precise accordance with the terms and conditions of the assignment. It may be that if these firm assets were to be administered in a court of equity, according to equitable principles, the court would direct the firm debts to be paid before these debts to Clark, although it is not certain that it would do so, and it is not now necessary to determine whether it would or not. Hoare v. Oriental Bank Corp., L. R. 2 App. Cas. 589. These defendants, being jointly liable to Clark, have themselves provided that his claims shall be paid out of the firm assets, and there is no room for the interference of any court. As between him and them, his claim upon the firm property is just as meritorious and equitable as the claim of

firm creditors. After the execution of the assignment, and the provision made therein for the payment of these debts, L. Sophia Williams had no equitable claim that the firm property should not be applied precisely as she had directed that it should be applied. Hence, on the principles of subrogation, the firm creditors can take no equity from her which they can enforce against the firm property, upon principles laid down in the case of Saunders v. Reilly, 105 N. Y. 12, 12 N. E. 170, 59 Am. Rep. 472, and cases therein cited. If these notes had been the individual debts of Helen A. Williams, for which L. Sophia Williams was in no way liable, then the provision in the assignment for their payment out of firm assets would have been a fraud upon the firm creditors, within the case of Wilson v. Robertson, 21 N. Y. 587. The ground of that decision was that the joint property was appropriated for the payment of an individual debt of one of the members of the firm for which the other member was in no way liable. But no case can be found holding that it is a fraud upon the firm creditors for the members of a firm to appropriate the firm property to the payment of debts for which they are all liable. It is never a fraud upon the creditors of any person to appropriate his property for the payment of a debt for which he is liable; and so one who is jointly liable with others as a member of a firm, or otherwise, may appropriate his individual property for the payment of a joint debt, for the reason that he is liable to pay the joint debt, and his property could be seized by virtue of an execution issued upon a judgment for the joint debt to satisfy the same. Crook v. Rindskopf, 105 N. Y. 476, 12 N. E. 174. No benefit or ultimate advantage is secured to L. Sophia Williams by the appropriation of the firm property for the payment of debts which, as between her and Helen A. Williams, are the debts of the latter. Upon payment of these debts, there will be in the hands of the assignee a claim for the reimbursement of the firm against the individual estate of Helen A. Williams. That claim will be in the hands of the assignee, to be administered and disposed of under the assignment, and no benefit therefrom can come to either member of the firm until after the payment of all the firm and individual debts. We therefore see no reason to doubt that the assignment was valid and free from the imputation of fraud. The orders of the General and Special Terms should be reversed, and the motion granted, with costs in all the courts, and $10 costs of the motion.

III. Quasi Severable Character in Equity.

THORPE v. JACKSON.

(Court of Exchequer, 1837. 2 Y. & C. 553.)

Alderson, B. This was a demurrer to the plaintiff's bill on two grounds: First, for want of equity; secondly, for want of parties.

The first is the only material question. The bill is filed by the public officer of the Northern & Central Bank of England against four defendants, viz., Thomas Jackson and Luke Trotter, the executors of Edmund Hamer, deceased, and James Lomax and Patrick Magee, two of the surviving partners of the said Edmund Hamer. The facts stated in the bill are that Hamer, Lomax, and Magee, together with one William Dakin, who is stated since to have become wholly insolvent, opened a banking account jointly with the bank, paid in moneys from time to time, and received advances; that at the time of Hamer's death they were indebted to the Northern & Central Bank in a considerable sum on their joint banking account; and that Hamer died, leaving Jackson and Trotter his executors, who were possessed of assets sufficient for the payment of this debt after discharging all their testator's separate debts. The bill prays an account against the defendants, and that the executors of Hamer may pay the same, when ascertained, out of the assets in their hands. To this bill there is a demurrer for want of equity, on the ground that this debt survived at law, and that there is no claim in equity against the representatives of the deceased party.

After looking through all the cases referred to in the argument, I have come to a different conclusion, and think that, as to this point, the demurrer must be overruled. I take the rule to be as laid down by Lord Eldon in Ex parte Kendall, 17 Ves. 525, namely: "That where a man has chosen to take the joint contract of several, though at law his security is wearing out as each of his debtors dies, yet it is fit that the creditor, whose debt remains at law only against the survivors, should resort to the assets of a deceased debtor; and a court of equity will, under certain modifications, constitute that demand." Now, in this proposition, I find no trace of the distinction, set up in the course of the argument, that such debt must be a mercantile debt incurred by joint traders. Nor can I perceive why that should be so. It is true that the question has most frequently arisen in such cases. But this would naturally occur; for courts of equity, as stated in Gray v. Chiswell, 9 Ves. 118, by Lord Eldon, have, in establishing the rule, acted upon the intention of the parties, and in all mercantile transactions such intention is more obvious, for such contracts by the mercantile law are joint and several. But in Cowell v. Sikes, 1 Russ. 191, the two joint debtors were not partners in any trade, and yet the decision there was that the creditor might recover against the deceased partner's effects.

It is said that in Sleach's Case, 1 Mer. 564, Sir W. Grant has decided upon the distinction now contended for. I do not apprehend this to have been the case. He says, indeed, that by the mercantile law a partnership contract was several as well as joint, and then he adds that this may probably be the reason why courts of equity have considered joint contracts of this sort (that is, contracts joint in form) as standing on a different footing from others. I conceive, therefore, that partnership trading debts are only one, and that the most frequent, case of the general rule, which is that, wherever a court of equity sees that in a contract joint in form the real intention of the parties is that it shall be joint and several, it will give effect to such intention. Now, I think that a contract for a loan of money, giving to the creditor the benefit of the security of several persons, is of that description. Here it is a loan of money by bankers to certain persons, their joint customers. Is it not obviously the intention of both parties that the property of all shall be responsible for the money thus obtained? In the case of Simpson v. Vaughan, 2 Atk. 31, Lord Hardwicke, upon this obvious intention, corrected the mistake in the joint bond. Then the question arises whether this equity exists until after all the surviving contractors have been found incapable of paying the amount. I think that question concluded by the case of Wilkinson v. Henderson, 1 M. & K. 583, to the reasons of which I fully accede.

The other question raised upon the present demurrer is whether Dakin ought not to have been joined as a party to this suit. I think he ought. In the first place, it is not sufficiently stated whether his insolvency is of a permanent description; and, secondly, he is at all events interested in taking the account as to the amount of the joint debt, although it is true no decree can be made against him, nor against the two solvent partners.

Demurrer for want of equity overruled. Demurrer for want of parties allowed.

KENDALL et al. v. HAMILTON.

(House of Lords, 1879. L. R. 4 App. Cas. 504.)[1]

The plaintiffs, Kendall and others, in consequence of contracts made with the firm of Wilson & McLay, accepted certain bills and entered into other transactions, the result of which was that a large sum was owing to them from said firm. They brought several actions against Wilson & McLay to recover this indebtedness and obtained judgments in their favor. These judgments were not satisfied. Wilson & McLay being in bankruptcy, the plaintiffs proved their claims in the bankruptcy proceedings and received a small dividend. The plaintiffs, subsequently learning for the first time that the defendant Hamilton

[1] The concurring opinions of Hatherley, O'Hagan, Blackburn, and Gordon, LL., and the dissenting opinion of Penzance, L., are omitted.

was a partner with Wilson & McLay in the transactions in which they had made their advances, brought action against Hamilton, seeking to hold him jointly liable for said indebtedness. In the trial court judgment was given for plaintiffs. On appeal this judgment was reversed. From this judgment of the reversal the present appeal was taken to the House of Lords.

CAIRNS, L. C. (after disposing of the case against the plaintiffs on the ground of agency). My Lords, if the view which I have taken of the facts and of the law applicable to them is correct, it is not necessary to look at Wilson, McLay, and Hamilton in the position of co-contractors; but, looking at them in this light, I must say that the case of King v. Hoare, 13 M. & W. 494, appears to me to have been decided on satisfactory grounds. It is the right of persons jointly liable to pay a debt to insist on being sued together. If, then, there are three persons so liable, and the creditor sues two of them, and those two make no objection, the creditor may recover judgment against those two. But, should he afterwards bring a farther action against the third, that third may justly contend that the three should be sued together. It is no answer to him to say that the other two were first sued and made no objection, for the objection is the objection of the third, and not of the other two. Nor is it any answer to him to say that whatever he pays on the judgment against himself he may have allowed in account with the others, because he may fairly require, with a view to his right of account or contribution, to have the identity and the amount of the debt constituted and declared in one and the same judgment with his co-contractors. If, therefore, when the third is sued, and requires that the other two should be joined as parties, the creditor has to admit that he cannot join the other two because he has already recovered a judgment against them in the same cause of action, this is equivalent to saying that he has disabled himself from suing the third in the way in which the third has a right to be sued.[2]

It has been suggested that, even assuming the case of King v. Hoare, 13 M. & W. 494, to have been rightly decided, the law as laid down in that case has been altered by the judicature acts and by the abolition

[2] "The doctrine of law regarding merger is perfectly intelligible. Where security of one kind or nature has been superseded by a security of a higher kind or nature, it is reasonable to insist that the party seeking redress should rest upon the latter, and not fall back on the former. In like manner, when that which was originally only a right of action has been advanced into a judgment of a court of record, the judgment is a bar to an action brought on the original cause of action. The reasons for this result are given by Baron Parke in King v. Hoare, supra. He says: 'The judgment is a bar to the original cause of action, because it is thereby reduced to a certainty, and the object of the suit attained so far as it can be at that stage; and it would be useless and vexatious to subject the defendant to another suit for the purpose of attaining the same result. Hence the legal maxim, "Transit in rem judicatam." The cause of action is changed into matter of record, which is of a higher nature, and the inferior remedy is merged in the higher.' " Per Penzance, L., in Kendall v. Hamilton, supra.

of the plea in abatement. I am unable to agree to this suggestion. I cannot think that the judicature acts have changed what was formerly a joint right of action into a right of bringing several and separate actions. And, although the form of objecting by means of a plea in abatement to the nonjoinder of a defendant who ought to be included in the action, is abolished, yet I conceive that the application to have the person so omitted included as a defendant ought to be granted or refused on the same principles on which a plea in abatement would have succeeded or failed. In this particular case, indeed, I observe the judgment against Wilson & McLay was obtained before the judicature act came into operation; and if this judgment then became pleadable in bar, according to King v. Hoare, supra, by Hamilton in answer to an action against himself, I cannot see how this defense is taken away from him by the judicature act subsequently coming into operation.

If, then, this was the attitude of defense which Hamilton was entitled to take up in opposition to the present action, it does not appear to me that any difference is made by the doctrines of the court of equity with regard to partnership debts. There is no doubt that in many cases and text-books we find the expression that a partnership debt is in equity joint and several. This, however, is only a compendious expression, which must be interpreted with reference to what were the functions of the court of equity as to partnership debts. The only interposition of a court of equity with regard to partnership debts took place in the administration of the assets, either of the partnership or of a deceased member of the partnership. Where a member of the partnership died, the debts became in the eye of a court of law the debts of the survivors; but the survivors, on the other hand, in a court of equity, had the right, as against the estate of a deceased partner, to say that his representatives should not withdraw any part of the partnership property until all the debts were paid or provided for. If, therefore, a court of equity was administering the assets of a deceased partner, it would, in order to clear his estate, ascertain his liabilities to the partnership, and for this purpose would ascertain the debts due from the copartnership at his death. From this the transition was easy to giving the creditors of the partnership a direct right, and not merely an indirect right, through the surviving partners, to come for payment against the assets of the deceased partner; and from this again the transition was easy to the expression which said that partnership debts, in the eye of a court of equity, were joint and several—not thereby meaning that a court of equity altered or changed a legal contract, but merely that the court, in order, before distributing assets, to administer all the equities existing with regard to them, would go behind the legal doctrine that a partnership debt survived as a claim against the surviving partners only, and would give the creditor the benefit of the equity which the surviving partners might have insisted on.

If, therefore, this case is to be looked at as a case in which judgment has been recovered for a partnership debt against two out of three copartners, it appears to me that, on the principle of King v. Hoare, 13 Mees. & W. 494, the judgment would be a bar at law to a subsequent action against the third copartner; and I know of no principle on which a court of equity could hold the debt to be several for the purpose of preventing such a result.

In any view of the case, therefore, I am of opinion that the judgment of the Court of Appeal was correct, and I have to move your Lordships to dismiss the appeal, with costs.

SHELBORNE, L. My Lords, the argument of the appellants was chiefly, if not wholly, founded upon the course of the Court of Chancery in the administration of the assets of a deceased person who has been a partner in a trading firm, and upon the language held by several judges of high authority with respect to the equitable position of partnership creditors.

If that language were found to be technically exact, when tested by the practice of courts of equity, upon all occasions when the rights of partnership creditors have come in question, it might (perhaps) be a sound conclusion that its principle ought to be extended to such a case as the present, though no precedent directly in point has been produced. But the fact is otherwise. If every debt of a trading partnership were regarded in equity as, from its commencement, joint and several, in the proper sense of those words, there could be no reason why, in bankruptcy, where equitable are regarded as much as legal rights, it should not have been treated in the same way as any other joint and several debt; nor why Lord Eldon should have made such a decree as he did in the case of Gray v. Chiswell, 9 Ves. 118. Nor do I think it possible that if, in equity, a separate debt due from a creditor of a firm to one of the partners could be set off against the debt of the firm, there would not have been ample authority for that proposition.

If no rule had been established in equity, giving partnership creditors a remedy against the assets of a deceased partner, it would have seemed clear, on principle, that in all these cases, when there was no mistake to be rectified in any written instrument, the legal contract between the creditor and the debtors was the only contract, and that its construction must be the same in equity as at law.

I conclude, therefore, that those expressions of eminent judges in which partnership debts have been spoken of as in equity joint and several were not meant by them to be understood in the proper and technical sense of those words, and that they cannot safely be used to establish any rule or principle extending beyond those limits within which courts of equity have hitherto given to creditors of a partnership remedies which they could not have obtained at law.

It is undoubtedly true that the remedy which a court of equity gives to a partnership creditor in the administration of the assets of a deceased partner has the effect of preserving to him the liability of an

estate which, by the survivorship of the codebtor or codebtors, has at law become exonerated. Great judges, such as Lord Eldon and Lord Thurlow, have felt difficulty in referring this course of practice to any very clear or satisfactory principle. It has been said to depend upon, or to arise out of, the adjustment of the rights and liabilities of the deceased and the surviving partners inter se; but this explanation does not, to my mind, remedy the difficulty, because, upon that principle, it would seem that the creditors ought to be limited, in each particular case, by the extent of the rightful claims of the surviving partners upon the deceased partner, and to be wholly excluded if the state of the accounts between them were such as to make it just to leave the whole liability where the law had cast it, viz., upon the surviving partners. The actual course of administration (subject to the distinction between a personal action and proof against assets) has been to give the creditor as large and unqualified a remedy against the estate of the deceased partner as he would have had by action at law in his lifetime. There is (as it seems to me) only one really consistent explanation of this course of practice, when taken in connection with the rule in bankruptcy, and with the general principles of law and equity, viz., that derived from the doctrine, "Jus accrescendi inter mercatores locum non habet." As in several other well-known classes of cases (of which mortgages and security bonds, with penalties, may be taken as examples), equity controls the operation of a legal contract so as to give effect to the purposes and objects to which it was meant to be subsidiary, so in these partnership cases it controls, inter mercatores, the legal effect of survivorship. If that is the principle of the rule, it is one which arises upon death only. The partnership is dissolved by death; but in equity it is taken as still subsisting, for every purpose of liquidation, just as if it had been dissolved inter vivos, and the creditors are taken as still creditors of that partnership. What was before joint thus becomes several, by the dissolution, and by the exclusion in equity of the survivorship which takes effect in law; and although, when this rule was first established, it might well have been doubted whether it did not give creditors rights for which they had never contracted, there could be no doubt, after it had once become a settled rule, that the rights resulting from it were necessarily implied in all subsequent onerous contracts by copartners. For this purpose (and, as it seems to me, for this purpose only, and only by the operation of death) all such contracts may be described as in equity joint and several.

My conclusion is that in the present case there is no equity upon which the appellants can be entitled to be relieved from the legal effect of the judgment obtained by them against Wilson, McLay & Co., if (as the equitable argument assumes) that judgment had the effect of extinguishing, in the lifetime of all the partners, the legal liability of the respondent as a partner for the debt previously due from the partnership of which he was a member. There is no question here of jus

accrescendi. The question relates simply to the constitution of the appellants' debt. Before the action it was a joint debt; but by the result of the action (if the decision in King v. Hoare, supra, is right, and is applicable to this case), it became the separate debt of Wilson, McLay & Co. only. If the joint debt, for which alone the respondent was ever liable, was merged and extinguished at law by this judgment (on which the respondent is clearly not liable, either at law or in equity), it seems to me to be impossible that equity should, on that ground, raise or imply against him, out of the original contract, a separate liability to the appellants from which he is free at law, whatever may be the rights, by way of contribution, indemnity, or otherwise, which Wilson, McLay & Co. may possess against him in respect of this judgment.

Appeal dismissed, with costs.

VOORHIS v. CHILDS' EXECUTOR.

(Court of Appeals of New York, 1858. 17 N. Y. 354.)

SELDEN, J. Prior to the enactment of the Code of Procedure there was a conflict of opinion between the courts of this state and those of England as to the remedy allowed to the creditors of a partnership against the representatives of a deceased partner. It was conceded by both that only the surviving partners could be sued at law; but it was held by the English courts that the representatives of the deceased partner might be immediately proceeded against in equity and compelled to pay the entire debts of the firm, without any previous resort to the surviving members, or any evidence that such debts could not be collected from them, while, on the other hand, our courts held either that the remedy against the survivors must first be exhausted or it must appear that they were insolvent and unable to pay.

Prior to the case of Devaynes v. Noble, 1 Mer. 397, the decisions of the Court of Chancery in England appear to have been, for a considerable time at least, in accordance with those in this state. The precise ground of the change seems to have been this: In the earlier cases it had been assumed that the liability in equity of the estate of the deceased partner was produced by a sort of equitable transfer to the creditor of the right of the surviving partners to insist that the estate of their deceased associate should contribute to the payment of the debts of the firm; but, upon its being afterwards held that the obligations of partners were to be regarded as joint and several, the English courts said that in all cases of that kind creditors had a right to pursue their remedies against all or either of their debtors. They therefore held that they might proceed immediately in equity against the representatives of a deceased partner, without resorting to their legal remedies against the survivors. The courts in this state, however, re-

fused, for what appear to be substantial reasons, to adopt the change. Its effect was to apply to a proceeding in equity the strict legal rules applicable to suits at law. It obviously overlooked many equitable considerations of great force. The surviving partners succeed primarily to all the rights and interests of the partnership. They have the entire control of the partnership property, and the sole right to collect the partnership dues. The assets of the firm are, of course, to be regarded as the primary fund for the payment of the partnership debts, and it would seem equitable at least that the parties having the exclusive possession of this fund should be first called upon. The answer given to this by the English courts, that the representatives of the deceased partner have their remedy over, seems hardly satisfactory. The presumption is that the primary fund is sufficient to meet the demands upon it. Why, then, permit in equity a resort to another fund, and thus give rise to a second action for its reimbursement. Besides, these English decisions, permitting the creditor to proceed in the first instance in equity against the estate of the deceased partner, are in conflict with the established doctrine that parties must first exhaust their legal remedies before resorting to courts of equity.

But, whether these considerations are sufficient to justify the position assumed by our courts or not, it may be regarded as having been settled in this state, prior to the Code, that the creditor in such a case could not come into a court of equity without showing either that the surviving partners had been proceeded against to execution at law or that they were insolvent. Grant v. Shurter, 1 Wend. 148; Hamersly v. Lambert, 2 John. Ch. 508; Leake & Watts Orphan House v. Lawrence, 11 Paige, 80; Id., 2 Denio, 577. In the last of these cases the English cases referred to were cited and distinctly overruled. There are many American cases, both in the state and United States courts supporting and confirming the doctrine of the courts of this state upon this subject. Pendleton v. Phelps, 4 Day (Conn.) 481, Fed. Cas. No. 10,923; Van Reimsdyk v. Kane, 1 Gall. (U. S.) 385, Fed. Cas. No. 16,871; Sturges v. Beach, 1 Conn. 509; Alsop v. Mather, 8 Conn. 584, 21 Am. Dec. 703; Caldwell v. Stileman, 1 Rawle (Pa.) 212; Hubble v. Perrin, 3 Ham. (Ohio) 287. [After holding that section 118 of the New York Code did not authorize the action, the opinion concludes:]

As, therefore, the present action must be regarded as one of a purely legal nature, brought against the surviving partners upon their legal liability, it follows that the executors of the deceased partner, who is liable only in equity, were improperly made parties. If we are right in our reasoning, the complaint is clearly defective in this respect, and the judgment of the Supreme Court should therefore be affirmed.

Judgment affirmed.

DOGGETT v. DILL.

(Supreme Court of Illinois, 1884. 108 Ill. 560, 48 Am. Rep. 565.)

CRAIG, J. William E. Doggett died April 3, 1876, testate, and Kate E. Doggett, appellant, who was named as executrix, qualified as such in the probate court of Cook county. Doggett, at the time of his death and for many years before, was a member of the firm of Doggett, Barrett & Hills. In 1871, T. C. H. and Lucy W. Smith executed their two promissory notes for certain sums of money, payable to Charles H. Dill. The two notes, on the date of their execution, were guaranteed by Doggett, Barrett & Hills, the firm name to the guaranty being executed by Doggett. No effort was made by Dill to collect the amount due on the notes from the firm assets, or from the surviving members of the firm of Doggett, Barrett & Hills; but after the death of Doggett he presented his claim to the probate court, to be allowed against the estate of deceased. The probate court, upon the evidence introduced, allowed the claim, and the executrix appealed to the circuit court, where a second trial was had, resulting in a judgment against the estate. An appeal was then taken to the Appellate Court, where the judgment of the circuit court was affirmed, and this record is brought here by the executrix for the purpose of reversing the judgment of the Appellate Court.

It is insisted by appellant that a partnership demand cannot be allowed against the individual estate of a deceased partner until the legal remedy against the partnership assets and surviving partners has been exhausted.

In Mason v. Tiffany, 45 Ill. 392, which was a proceeding in chancery by a creditor of a firm to enforce payment of a firm debt against the estate of Tiffany, a deceased member of the firm, it was held that, every partnership debt being joint and several, it follows, necessarily, that resort may be had in the first instance for the debt to the surviving partners or to the assets of the deceased partner. In the decision of the case it is said: "If it was a fact that the surviving partners remained solvent for a long time before the assignment, and the assigned assets were sufficient to pay this claim, still these did not require the complainant to press his claim against them; the estate of the deceased partner being equally a fund on which he had a right to rely." This case seems to establish the doctrine in plain words that a creditor in equity has the right, where he holds a claim against a firm, one member of which has died, to proceed against the estate of the deceased member or the surviving partners as he may elect.

In Silverman v. Chase, 90 Ill. 37, the same question arose, and, following the doctrine of the case last cited, it was said: "A partnership debt is joint and several, and the creditor has the right to elect whether he will proceed against the assets in the hands of the surviving partner or against the estate of the deceased partner, as held by this court in

Mason v. Tiffany, 45 Ill. 392. Nor will the laches of the creditor in following the assets of the firm preclude a recovery. The creditor has the right to proceed against the estate at any time before the statute of limitations has run, and a failure to pursue the partnership assets cannot be relied upon as a defense when suit is brought against the estate."

These two cases would seem to be conclusive of the question presented, so far, at least, as this court is concerned, as they in terms decide the same question involved in the record before us, and it would not be deemed necessary to say anything more on the question, were it not for the fact that it is claimed that these cases are in conflict with prior decisions of this court, and the doctrine therein announced is not sound and in harmony with the current of authority on the subject. We have therefore concluded to briefly refer to some of the authorities which have a bearing on the question, with the view of showing that the decisions of this court are fully sustained by the weight of authority.

Story on Partnership, § 362, says: "The doctrine formerly held upon this subject seems to have been that the joint creditors had no claim whatsoever in equity against the estate of the deceased partner, except when the surviving partners were at the time, or subsequently became, insolvent or bankrupt. But that doctrine has been since overturned, and it is now held that in equity all partnership debts are to be deemed joint and several, and consequently the joint creditors have in all cases the right to proceed at law against the survivors, and an election also to proceed in equity against the estate of a deceased partner, whether the survivors be insolvent or bankrupt, or not." The same doctrine, but in different language, is declared by Story in his work on Equity Jurisprudence (section 676).

Collyer on Partnership, § 580, declares the law in the following language: "It is now established beyond controversy that in the consideration of courts of equity a partnership debt is several as well as joint, and that upon the death of a partner a joint creditor has a right in equity to proceed immediately against the representative of the deceased partner for payment out of his separate estate, without reference to the question whether the joint estate be solvent or insolvent, or to the state of accounts amongst the partners."

Dixon on Partnership, 113, says: "When a liability exists, the creditor may, at his option, either pursue his legal remedy against the survivor, or resort in equity to the estate of the deceased; and this altogether without regard to the state of the accounts between the partners themselves, or to the ability of the survivor to pay."

Lindley on Partnership, 1053, says: "Whatever doubt there may formerly have been upon the subject, it was clearly settled before the judicature acts that a creditor of the firm could proceed against the estate of the deceased partner without first having recourse to the surviving partners, and without reference to the state of the accounts be-

tween them and the deceased." See, also, Pars. Merc. Law, 192; Adams, Eq. 173; Smith, Merc. Law, 48; 3 Kent, Com. 63, 64, and note.

From the citations made, it would seem that the law, as declared in Mason v. Tiffany and Silverman v. Chase, supra, is fully sustained, at least by text-writers of high authority, both in this country and in England. But it will not be necessary to rely alone on the text-books for a solution of the question, as the decisions in England and many of the states are in harmony with the rule declared in the text-books. In England, as early as 1816, in Devaynes v. Noble, 1 Mer. 529, it was decided that in equity partnership debts are joint and several, and a creditor holding a firm debt could resort to the estate of the deceased partner for payment, without showing the insolvency of the survivor. The rule adopted in the case cited was subsequently adhered to and followed in Wilkinson v. Henderson, 1 M. & K. 582, and since the decision of these cases the doctrine there announced has been regarded as the settled law of England. In Nelson v. Hill, 5 How. 127, 12 L. Ed. 81, the Supreme Court of the United States held that the creditor of a partnership may, at his option, proceed at law against the surviving partner or go in the first instance into equity against the representatives of the deceased partner; that it was not necessary to exhaust his remedy at law against the surviving partner before proceeding in equity against the estate. In support of the rule announced Story on Partnership, § 362, note 3, is cited. In a later case (Lewis v. United States, 92 U. S. 622, 23 L. Ed. 513) Nelson v. Hill is cited with approval. In Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321, the Supreme Court of Connecticut, in an able opinion, adopt the rule of the courts of England. In Weyer v. Thornburgh, 15 Ind. 124, the question arose, and the Supreme Court of that state adopt the rule in the language of Story on Partnership, cited supra, and this decision was followed in a number of subsequent cases. Dean v. Phillips, 17 Ind. 406; Hardy v. Overman, 36 Ind. 549. In Freeman v. Stuart, 41 Miss. 141, the question arose, and the Supreme Court of that state held that in equity all partnership debts are joint and several, and a creditor has the right to proceed in law against the survivor, and an election also to proceed against the separate estate of the deceased partner, whether the survivor be solvent or not. See, also, Irby v. Graham, 46 Miss. 428, where the English rule is fully approved. The same doctrine has been adopted in Vermont, in Washburn v. Bank, 19 Vt. 278; in Tennessee, in Saunders v. Wilder, 2 Head, 579; in Arkansas, in McLain v. Carson, 4 Ark. 165, 37 Am. Dec. 777; in New Jersey, in Wisham v. Lippincott, 9 N. J. Eq. 353; in Alabama, in Travis v. Tartt, 8 Ala. 577; in Florida, in Fillyan v. Laverty, 3 Fla. 72; in Texas, in Gaut v. Reed, 24 Tex. 46; and in New Hampshire, in Bowker v. Smith, 48 N. H. 111, 2 Am. Rep. 189. In New York and Georgia a contrary rule has been adopted, as will be found in the

following cases: Leake & Watts Orphan House v. Lawrence, 11 Paige (N. Y.) 80; Voorhis v. Childs, 17 N. Y. 354; Bennett v. Woolfolk, 15 Ga. 213. Upon an examination of the New York cases it appears that the rule there adopted was supposed to be predicated on the old English cases, and when the courts of England established the doctrine which is laid down as the law in Devaynes v. Noble and Wilkinson v. Henderson, supra, the New York courts refused to follow the English rule, but adhered to what was supposed to be the law in England as declared in that court prior to that time. Georgia seems to follow the New York rule. In a late case in Wisconsin, Sherman v. Kreul, 42 Wis. 33, the Supreme Court say: "We are disposed to adopt the New York rule, that in order to recover against the administrators the plaintiff should allege and show that the surviving partner is insolvent." It is also claimed by appellant that the New York rule has been adopted in North and South Carolina, Ohio, and Pennsylvania; but, without stopping to determine precisely what the rule of the courts of these states may be, we are satisfied that the decided weight of authority is in harmony with the rule adopted in this state, and we are not inclined to change the rule heretofore adopted in this state, and follow the doctrine established by the courts of New York and Georgia, although we fully recognize the great ability of those courts. * * *

But, independent of the authorities, we are satisfied that the rule holding the estate of a deceased partner primarily liable in equity is sound in principle. Doggett, in his lifetime, was individually liable for this debt, and if he had been sued, and a judgment obtained against him, any of his individual property would have been liable to be taken and sold in satisfaction of the debt. It is true, if he had been sued at law in his lifetime, it would have been necessary to join his partners as defendants in the action; but after judgment it was not necessary to exhaust the partnership assets before individual property could be taken, but the creditor could resort to such property in the first instance, if he saw proper. Did the death of Doggett in any manner change the liability which existed on this contract before his death? We think not. The liability continued as before, but the remedy to enforce that liability was changed from a court of law to a court exercising equitable powers. Before his death the liability could only be enforced by a joint action against Doggett and his partners. After his death the liability continued, but could only be enforced in the probate court, which in the allowance of claims exercises equitable powers. The death of a debtor may extinguish a legal remedy on a joint contract; but we are not aware that it has ever been held that the death of a debtor could extinguish the debt or discharge the estate of the deceased.

In conclusion, we are satisfied, under the facts as disclosed by this record, appellee's claim was a proper one to be allowed against the

estate of the deceased, and that it was properly allowed by the probate court.

The judgment of the Appellate Court will therefore be affirmed.

Judgment affirmed.

McLAIN & BADGETT v. CARSON'S EXECUTOR.

(Supreme Court of Arkansas, 1842. 4 Ark. 164, 37 Am. Dec. 777.)

The firm of Sarah Percifull & Co., composed of Samuel P. Carson and Sarah Percifull, purchased a quantity of articles of McLain & Badgett. Some time afterwards Carson died, and McLain & Badgett exhibited their account, duly authenticated, to his executor, Robert Hamilton, for allowance. He having refused to allow the account, McLain & Badgett presented it to the probate court of Lafayette county, where it was allowed, and directed to be paid in "class 4." The executor appealed to the circuit court of Lafayette, and, that court having reversed the judgment of the probate court, McLain & Badgett brought up the case by appeal to this court.

There was no controversy as to the facts, and the appellant's right to an allowance was made, by express agreement on the record, to depend upon the decision of the legal question whether payment could be coerced from the estate of Carson, in the hands of the executor, without resort first being had, and proceedings taken, against the partnership funds, if any, in the hands of the surviving partner, Sarah Percifull.

Lacy, J. The doctrine of partnership, in these cases, is well settled in England. At law the contract was always treated as a joint agreement, and upon the death of one partner a joint creditor could not proceed against his separate estate. The reason is that by the death of the joint partner, the joint contract, as to him, becomes extinguished. The creditor may have his action against the survivor or joint contractor. 1 Ch. Pl. 57; Collier on Part. 337. In equity there is some conflict between the authorities. The creditor in equity will be permitted to receive satisfaction of his debt out of the estate of the deceased partner under certain restrictions, through the medium of subsisting equities between the parties themselves; and Lord Eldon has pithily remarked "that separate creditors must take the separate estate, and the joint creditors the surplus." Greer v. Chiswell, 9 Vesey, 118; Jacomb v. Hartwood, 2 Vesey, 265. And Lord Brougham said, in Sumner v. Powell, 1 Mer. 73, "that a partnership debt has been treated in equity as the several debt of each, though in law it is only the joint debt of all."

The general rule upon the subject is that if, upon the decease of a partner, the creditor's contract is to be treated as several, as well as joint, in respect to the firm, then he will, of course, be entitled to receive satisfaction in equity immediately out of the estate of the de-

ceased partner, and to take his portion pari passu with separate creditors.

Under our laws no such thing as a joint contract, in the sense in which it is used in England, can be allowed. Our statute regulating proceedings upon such subjects enacts "that all joint debts or obligations shall survive against the heirs, executors, and administrators of such joint debtor or obligor, as may die before the discharge of such joint debt or obligation." Rev. St. 1837, p. 475, §§ 1-6. This act makes a partnership debt a several as well as a joint contract; and the partnership creditor is, consequently, invested with a legal right to proceed immediately against the estate of the deceased partner, and to be paid at the same time with separate creditors. The debt against the firm being separate as well as joint, the death of the one partner cannot extinguish the separate demand against his estate. That contingency leaves his right in full operation, and the deceased partner's estate bound separately for the debt.

Judgment reversed.

HALL v. COOK.

(Supreme Court of Alabama, 1881. 69 Ala. 87.)

This was a suit by Bolivar H. Cooke against Oliver L. Hall, Alexander H. Mackey, and Luther C. Hall, on an account for goods, wares, and merchandise sold and delivered to the defendants by the plaintiff, and was tried on the plea of the general issue. On the trial the depositions of the plaintiff and another witness examined on his behalf, taken upon interrogatories, were offered in evidence by the plaintiff. In the interrogatories propounded to the plaintiff he was asked whether there was any thing due to him from Hall, Mackey & Co., and, if so, how much, and for what it was due. To this question he answered, in substance, that they owed him $140.50 for goods sold and delivered to them by him. To the question and answer the defendants objected, on the ground that the question "called for an indebtedness due from Hall, Mackey & Co., and the answer purported to prove an account due from Hall, Mackey & Co., and not these defendants," and that, therefore, there was a variance between the proof offered and the allegations of the complaint. On the statement of the plaintiff that he would show that the defendants were members of the firm of Hall, Mackey & Co., the court overruled the defendants' objection and allowed the answer to be read to the jury, and the defendants excepted. Other objections of like character were made by the defendants to other interrogatories propounded to the plaintiff and the other witness, and their answers thereto, which were also overruled by the court, and exceptions reserved to the rulings of the court thereon by the defendants. The plaintiff afterwards proved that his attorney presented the claim sued on to the defendants, "who were members

of the firm of Hall, Mackey & Co., and they each admitted the justness of the amount of the claim." The depositions read in evidence also tended to prove the correctness of the account sued on. The defendants offered no evidence. The court charged the jury, at the request of the plaintiff, in writing, that it was sufficient if the evidence showed that the defendants were members of the firm of Hall, Mackey & Co. To the giving of this charge the defendants excepted. The giving of this charge and the rulings of the circuit court on the evidence are here assigned as error.

STONE, J. Under our statute (Code 1876, § 2904), when there are "two or more persons associated together as partners in any business or pursuit, who transact business under a common name, whether it comprise the names of such persons or not, * * * any one of the associates, or his legal representative may be sued for the obligation of all." The effect of our statutes is to make the promises, contracts, and obligations of partnerships, given within the scope of their partnership dealings, the promises, contracts, and obligations of the partnership and of each and every member thereof. The contract itself makes it joint, and our statute makes it also several; this because, when the promise is given or obligation entered into within the scope of the partnership dealings, it is alike the contract or obligation of all and of each member of the firm. Such promise need not be in writing, unless it is of the nature which the law requires to be in writing; and joint contracts may be made, with or without writing. In McCulloch v. Judd, 20 Ala. 703, it was said: "A creditor may sue one or all the members of a firm on a debt contracted in the firm name, and may declare on the demand as the individual liability of the partner or partners sued."

We find no error in this record, and the judgment of the circuit court is affirmed.[1]

SECTION 2.—NATURE AND EXTENT OF LIABILITY IN TORT.

WHITE v. SMITH.

(Court of Appeals and Court of Errors of South Carolina, 1860. 12 Rich. Law, 595.)

WARDLAW, J. This is an action on the case to recover damages from the defendant for negligence in the care of a slave committed to his custody on hire, by means whereof the slave was destroyed and wholly lost to the plaintiff. The first ground of appeal insists that

[1] In Sandusky v. Sidwell, 173 Ill. 493, 50 N. E. 1003 (1898), it was held that a statute providing that "all joint obligations and covenants shall be

there is a variance between the allegation that the slave was hired to defendant and the proof of hiring to defendant and his partner, Moore, fatal to the action against one of the partners, inasmuch as both should have been sued. In actions ex contractu it was formerly the rule that the nonjoinder of one or more joint contractors was fatal on motion for nonsuit, where the general issue was pleaded; but it is settled since Rice v. Shute, 5 Burr. 2611, in avoidance of the delay and expense of a trial, that this objection is waived by pleading the general issue, and that advantage of it can be taken only by plea in abatement, even where the plaintiff fully knew who were the joint contractors. And whatever may be the form of action, wherever the nonperformance of a contract is the basis of the suit and the contract must be proved, as in case for breach of a warranty of sale, the nonjoinder of a joint contractor is fatal on plea in abatement; for the plaintiff will not be allowed, by varying the form of his action, to annul or obviate the rules of legal procedure concerning parties to contracts. 1 Chit. Pl. 87; Max v. Roberts, 12 East, 94; Weall v. King, 12 East, 451; Stockfleet v. Fryer, 2 Strob. 307; Patton v. Magrath, Rice, 162, 33 Am. Dec. 98. On the contrary, in actions ex delicto generally, and always where a contract is not the gravamen of suit and is merely a matter of inducement or recital, a plaintiff may, at his option, treat the tort committed by two or more persons as either joint or several, and accordingly sue all or any of the tort-feasors; and if one of the wrongdoers be sued alone, as the tort attaches upon each individually, he cannot plead the nonjoinder of the others in bar or abatement, nor give it in evidence under the general issue. 1 Chit. Pl. 87; Atty. Gen. v. Burgess, Bunb. 223; Govett v. Radnidge, 3 East. 62; 6 Taunt. 29, 35, 42; 6 Jno. 31. Now, in this case, the gist of the action is the negligence of the defendant in the safe-keeping of a slave under his charge, and the contract of hiring is merely matter of preliminary statement, to explain that the slave was really under the charge of defendant, and proof of any other process by which the charge resulted would have been admissible.

In his first ground of appeal defendant also insists that if there were any negligence it was on the part of the agent of the partners, Moore & Smith (and not his individual agent), for the torts of whom he is not separately liable. From the community of interests between partners, each is responsible for the contracts of all or any one of them in the prosecution of the business of the partnership. Jackson was no less the agent of the defendant because he was also the agent of the partner, Moore. Gow, in his treatise on Partnership, 184, 185, and notes there, and 160, after laying down the doctrine that in such actions as case for malfeasance the tort as between partners attaches upon each of the wrongdoers individually, and that one may be sued

taken and held to be joint and several obligations and covenants" applies only to contracts, obligations, and covenants made jointly by persons in their individual capacity, and has no reference to partnership obligations.

alone, proceeds: "Nor in such an action is it material whether the tort was committed by the partners personally, or by their servant in the prosecution of their business, since, in the latter case, the rule 'qui facit per alium, facit per se,' applies, and renders them and each of them responsible for the consequences." To the same effect, other text-writers on partnership express the doctrine. Story, Part. 167; Story, Agency, 308; 3 Collyer, Part. p. 414, c. 1, § 6; Id. p. 640, c. 6, § 3; Watson, Part. p. 235, c. 4. In Mitchell v. Tarbutt, 5 T. R. 649, in an action on the case, against some of several partners in the ownership of a ship, for negligence in their servant or agent, in running down a ship of plaintiffs laden with sugar, whereby the sugar was lost, it was held that defendants could not plead in abatement that there are other partners not sued. Carthew, 171, 294; 7 T. R. 257.

Defendant's motion for new trial refused.

LOOMIS et al. v. BARKER.

(Supreme Court of Illinois, 1873. 69 Ill. 360.)

This was an action of trover by Richard P. Barker against William R. Loomis, Chauncey Lewis, and Charles F. Bogue, for the conversion of a span of horses. Bogue not being found, the suit was dismissed as to him. There was a verdict and judgment in favor of the plaintiff for $311.15. The leading facts are stated in the opinion.

SCHOLFIELD, J. The proof is sufficiently clear that the horses belonged to appellee and that at the time they were taken they were merely in the possession of Cook as a general agent, who was authorized to sell them for appellee and required to account to him for the proceeds of their sale. This did not invest Cook with any title to the horses, so as to render them liable to be seized on execution or attachment against him and sold for the payment of his debt.

Although it does not appear that Lewis was actually present when the horses were levied upon or sold, yet it does appear that he placed the claim upon which this was done in the hands of the constable, Bogue, and that his partner and codefendant, Loomis, treated and spoke of the property as having been taken and sold on an attachment issued upon this claim, that he was present and a bidder at the sale, and that he received the proceeds of the sale from Bogue as a payment upon this claim.

The rule is that partners are liable in solido for the torts of one, if that tort were committed by him as a partner and in the course of the business of the partnership. Parsons on Partnership, 150. "So," it is said, "in an action of trover it is not necessary that there should be a joint conversion in fact in order to implicate all the partners, for such a conversion may arise by construction of law. Thus an assent by some of the partners to a conversion by the others will make them

wrongdoers equally with the rest provided the conversion was for their use and benefit, and that they were in a situation to have originally commanded the conversion." Gow on Partnership, 175. See, also, Bane et al. v. Detrick et al., 52 Ill. 20.

We think the verdict was, under the evidence, in conformity with the law, and the judgment of the court below is therefore affirmed.

Judgment affirmed.

SECTION 3.—EXTENT OF LIABILITY IN CONTRACT.

HALLOWELL v. BLACKSTONE NAT. BANK.

(Supreme Judicial Court of Massachusetts, 1891. 154 Mass. 359, 28 N. E. 281, 13 L. R. A. 315.)

Holmes, J. This is a bill to redeem certain stock given by one Smith, the plaintiff's insolvent, to the defendant as collateral security for a loan to Smith. The main question is whether the defendant can hold the stock as security, not only for the loan mentioned, but also for two acceptances of a firm of which Smith was a member, which acceptances the defendant had discounted before the date of the loan in question. The note given by Smith for the loan authorizes the defendant to sell the stock "on the nonperformance of this promise, said bank applying the net proceeds to the payment of this note, and accounting to me for the surplus, if any." It then goes on, and these are the important words, "and it is hereby agreed that such surplus, or any excess of collaterals upon this note, shall be applicable to any other note or claim against me held by said bank."

The counsel for the plaintiff based his argument on the proposition that the right to apply the excess of collaterals to any other note or claim was conditional upon Smith's nonperformance of his promise. We think it doubtful at least whether that is the true construction of the words which we have quoted. We are disposed to read the agreement as an absolute pledge or mortgage of the securities for other notes and claims. But if this be not so we are of opinion that Smith did not perform his promise within the meaning of the note. The bank demanded payment of Smith on January 3, 1889, and he made partial payments, but failed to pay the residue and requested the bank to make the balance a time loan, which the bank refused. This was a nonperformance of his promise by Smith. It is true that the report states that it was understood that the demand should not be pressed without further notice. But this did not take away the effect of the breach. It merely called on the bank to give notice before taking further steps, such as selling the security, and this it did. We neither

construe the report as meaning, nor do we infer from it, that the breach of Smith's promise by his failure to pay on demand was waived by the bank. On January 3d, if not before, the bank's right vested to apply any excess of collaterals upon other claims.

The question remains whether the bank is entitled to hold the security for the bills, which were accepted by Smith's firm and not by him individually. It cannot be denied that the acceptances were "claims against him," and that the words used in his note were broad enough to embrace firm acceptances, unless there is some reason in the contract, the circumstances, or mercantile practice, to give them a narrower meaning. Singer Mfg. Co. v. Allen, 122 Mass. 467; Chuck v. Freen, Moody & M. 259. If Smith had had private dealings and a private account with the bank as a depositor, and his firm also had had dealings and an account there, and Smith had given security in the terms of his note in order to be allowed to overdraw or to obtain a discount, it may be that the generality of the language would be restrained to the line of dealings in the course of which it is used. Ex parte McKenna (City Bank Case) 3 De Gex, F. & J. 629. See Lindl. Partn. (5th Ed.) 119, and note. But we are called on to construe a printed form used by the bank, and presented by it for those who borrow from it to sign. The question is, what is the reasonable interpretation of such words? When insisted on as a general formula to be used by would-be borrowers, irrespective of any special course of business of the particular person who signs it, which, for the matter of that, there does not appear to have been in this case. For all that appears, the note mentioned may have been the only transaction that ever took place between the defendant and the plaintiff alone. The printed form, it may be assumed, would have been used by the bank equally in a case where the borrower was the principal man in his firm, and the only one known to the bank, was borrowing for his firm daily, and had never borrowed for himself but in this instance, and in a case where the borrower's membership in a firm whose notes the bank held was unknown. This being so, in the opinion of a majority of the court there is no sufficient reason for not giving the words their full legal effect. The clause pledging the property for any other claim against the debtor is not inserted with a view to certain specific debts, but as a dragnet to make sure that whatever comes to the creditor's hands shall be held by the latter until its claims are satisfied. Corey on Accounts and Lindley on Partnership have made it popular to refer to a mercantile distinction between the firm and its members. But we have no doubt that our merchants are perfectly aware that claims against their firms are claims against them, and when a merchant gives security for any claim against him, and there is nothing to cut down the literal meaning of the words, he must be taken to include claims against him as partner.

Bill dismissed.

BANK OF BUFFALO v. THOMPSON et al.

(Court of Appeals of New York, 1890. 121 N. Y. 280, 24 N. E. 473.)

See ante, p. 152, for a report of the case.

JUDD LINSEED & SPERM OIL COMPANY v. HUBBELL et al.

(Court of Appeals of New York, 1879. 76 N. Y. 543.)

DANFORTH, J. There are appeals in this case from two orders of the General Term of the Court of Common Pleas in the city of New York—one (of January 6th) reversing an order of the Special Term of that court and directing an amendment of the judgment in this action, and the other (of February 3d) denying a motion made by the plaintiff to amend and resettle the first order. If the court had power to make the order of January, they could amend or refuse to amend it, and their determination is final; and, although many questions have been argued by counsel concerning this matter, one only is properly before us for review. Had the court power to make the order? Evidently it had, unless restrained by that provision of the statute which declares that "no judgment in any court of record shall be set aside for irregularity on motion, unless such motion is made within one year after the time such judgment was rendered." Title 4, pt. 3, c. 6, art. 1, § 2, p. 359 (1st Ed.) 2 Rev. St. As the judgment was rendered on the 27th of April, 1872, and the order did in effect set it aside and was made on motion, notice of which was not served until January, 1877, it is apparent that it is necessary to determine whether the cause upon which the court acted was or not an irregularity and nothing more.

At the outset the plaintiff was called upon "to show cause why the judgment should not be vacated and set aside as irregular, in that a several judgment is entered against the defendant Hubbell for $10,-950.29, and a several judgment is entered against the defendant Taylor for $13,420.70, instead of a judgment against the defendants jointly, pursuant to the summons and complaint, also as unauthorized by law." The moving papers establish beyond controversy that the cause of action was a joint liability on the part of Hubbell and Taylor as copartners. This the complaint alleged, the defendant Hubbell by his default admitted, and the defendant Taylor has had that fact found against him by a referee, and by his silence acquiesces in the finding. Upon that determination the plaintiffs, at the same time and by means of the same record or judgment roll, took judgments against the defendants separately, as stated in the order to show cause. This was clearly irregular; but we think it was nothing more. The plaintiffs did not adhere "to the prescribed rule or mode of proceeding," by

which they were entitled to a joint judgment, and which a due and orderly conduct of the suit required them to take. But this defect was merely technical, and does not affect any substantial right of the adverse party. It does not in any way increase the liability of the defendant, for upon each partner rests an absolute liability for the whole amount of every debt due from the partnership (Parsons on Partnership [2d Ed.] 63); and, although originally a joint contract, it may be separate as to its effects. Though all are sued jointly, and a joint judgment obtained, and a joint execution taken out, yet it may be enforced against one only. Each partner is answerable for the whole, and not merely for his proportionable part; and, as the judgments were taken against each partner for a partnership debt, the partnership property is bound to the same extent as if there had been but one judgment for the whole against both partners. Brinkerhoff v. Marvin, 5 Johns. Ch. 326. Nor does the form of the judgment in any way affect the debtor's relations with his copartner; for, if he pays the debt or judgment, he will be entitled to contribution, or to a credit for the sum paid, in any accounting respecting the partnership affairs.

The order of the General Term, made January, 1879, reversing the order of the Special Term, should be reversed, and the order of Special Term affirmed; and the appeal from the order of the General Term, made February, 1879, should be dismissed, without costs to either party.

HOLMES v. BURTON et al.

(Supreme Court of Vermont, 1837. 9 Vt. 252, 31 Am. Dec. 621.)

This was an action of assumpsit, in three counts, against the defendants, as joint partners with one Levi Blood, under the firm of Levi Blood & Co. The first count was upon a note, alleged to have been signed by said Levi Blood, "for the interest, profit, and benefit of the said firm of Levi Blood & Co." The second and third counts were for a horse sold by plaintiff to defendants. The defendants pleaded non assumpsit. Issue joined to the court. On the trial of said issue the plaintiff proved the following facts, to wit: In the years 1834 and 1835, the defendants, together with Levi Blood, were copartners in trade, and carried on a retail store at Post Mills village, under the name and style of Levi Blood & Co. The business was conducted by said Levi Blood. He occasionally purchased and exchanged horses, sometimes paying therefor, in part, in goods from said store. Of this course the defendants had occasionally expressed disapprobation. Neither of the defendants resided in the immediate vicinity of the store. In February or March, 1835, Blood purchased of the plaintiff a horse, for which he gave the note in question, signed in his own name. This horse, together with two others, he sold in April, 1835, for $275. The

price at which he sold this horse was $100. This money was by him put into the other money of the concern, and entered on their cash book as money received for horses sold. In June, 1835, Blood bought a horse of J. Eastman, for which he first executed his own note; but, Eastman insisting on the name of the company, Blood added to his name the words "& Co." After this the defendants and Blood dissolved, and Blood left the country. Upon this dissolution it appeared that, in taking an account of the condition of the concern, among the debts outstanding against the firm was entered this note of Harry Holmes. When Blood left the concern, one Brown was received by the defendants as the acting partner, and to this new concern passed all the goods of the former one, and the horse so bought of Eastman and two other horses, which Blood then had. It did not appear directly that the defendants knew, at the dissolution, in what manner this note was signed. Brown, for the new concern, paid Eastman his note aforesaid. These were the whole facts proved. The court rendered judgment for the plaintiff, to which the defendants excepted, and the cause passed to this court.

PHELPS, J. We are of opinion that the plaintiff cannot recover upon either count in his declaration. Not upon the first count, for the note is, on the face of it, the individual note of Blood, and not of the partners. Here is an open, notorious partnership, and the paper does not profess to bind them. Had the defendants been dormant partners, the case would have been different. The signature might then be understood to be that of the firm, and, with proper averments and proof, the plaintiff might recover against them. But here there is a partnership, open and notorious, and upon the face of the note the presumption is that the plaintiff relied upon the responsibility of Blood alone.

Under the second count the question is whether the plaintiff can resort to the consideration of the note and recover as for goods sold. The first difficulty in this course is that the note itself is evidence that the horse was not sold to the firm, nor upon their credit. It has been held that, if money be advanced to a firm upon the individual security of one partner, the firm are not liable. This rule holds where the partnership is public, although it may not apply to the case of a dormant partnership. It goes upon the ground that the creditor elects to take the individual security. Secondly. This not being the case of a dormant partnership, the plaintiff cannot recover upon his general count, unless he is at liberty to repudiate the note, and can also recover upon the sale, as if no note had been given. He cannot repudiate the note, because there was no fraud nor concealment; and, further, it is not a case where the presumption would arise that the purchase was made in behalf of the partnership. The purchase of horses is not within the legal scope of the partnership, and one partner has no authority to bind the other in this way. It is said it is customary for mercantile firms in the country to deal in horses. This

will not vary the case. If a particular firm have dealt in this way, it will afford evidence in such case of an authority in one partner to bind the other; but, although the practice is common, it does not follow that it is a legal consequence of the connexion. Here, then, is a case where a contract is made, not within the scope of the partnership, and where the partner has not pledged the credit of the partnership, but his own. He had neither authority to bind his fellows, nor did he attempt to do so. How, then, can the plaintiff recover? The cases cited by the plaintiff are cases where the purchase was within the scope and for the benefit of the partnership. It is said, also, that the defendants may be considered, quoad this purchase, as dormant partners. Such a precedent would be dangerous in the extreme. It would obliterate the distinction between partnership debts and the individual debts of the partner, and it would be at variance with the settled law on the subject. The defendants may, indeed, have had the ultimate proceeds of the transaction. But this is not enough. Property may go to the ultimate benefit of a firm, and still the partners may not be liable. If there be any case in which one partner can purchase property or loan money to be put into a partnership on his own account, the argument fails. But there is no satisfactory evidence that the defendants had the benefit of this purchase. The money for which the horse was sold went into the concern, but upon what conditions does not appear. For aught we know, Blood credited himself with the money. As to the supposed adoption of the proceeding by the defendants, it is sufficient to say that it does not appear that they ever adopted it or recognized the debt as their own. The entering it as a debt of the concern was the act of Blood, and it does not appear that the defendants then knew how the note was signed. They could not be bound by any adoption of the act, unless with full knowledge of all the circumstances.

Judgment reversed, and cause remanded.

PETERSON v. ROACH.

(Supreme Court Commission of Ohio, 1877. 32 Ohio St., 374, 30 Am. Rep. 607.)

SCOTT, J. The sole question in this case is as to the sufficiency of the facts stated in the petition of the plaintiff in the court below to constitute a cause of action. Was the demurrer to it properly sustained?

The action was brought against the defendants, McCreath & Roach, as partners, to recover a sum of money alleged to have been paid by the plaintiff as surety for the firm. This payment is alleged to have been made in satisfaction of a judgment recovered against him and McCreath alone, upon two promissory notes executed by McCreath individually and by the plaintiff as surety, for money borrowed by McCreath of one Toberin for the use of the firm. There is no aver-

ment in the petition that the money borrowed of Toberin was loaned by him to the firm of McCreath & Roach. On the contrary, the averment is that the money was loaned to the defendant, William McCreath.

It is not alleged that said firm was doing business under the firm name of William McCreath, or that the notes given for its payment were executed in the firm name. On the contrary, it is averred that "said defendant, William McCreath, signed said notes in his individual name." A recovery is not sought against Roach as a dormant or secret partner, who permitted the firm business to be carried on in the sole name of McCreath, while he kept his own connection therewith concealed from the world. So far as appears from the petition, the partnership was open, public, and notorious; and it is not averred that the plaintiff became surety on the notes at the request of the firm, or of Roach, but simply at the request of McCreath.

It is, however, averred that the money, to secure the repayment of which the notes were given, was loaned to McCreath on account of, and for the use of, the partnership, and was in fact used in the business of the partnership, and that the plaintiff signed said notes at the request of McCreath, as surety for the said partners, and not for said McCreath individually, and in signing the same understood that he was becoming, and in fact did become, surety for said partners jointly, and not for said McCreath as an individual.

In so far as these averments may be understood as importing that the loan was made to the firm, or on its credit, and that the plaintiff became surety for the firm, we think they must be regarded as conclusions of law drawn by the pleader from the facts stated; that is, from the facts that the money was borrowed for the use of the firm, and was in fact applied to and used in its business transactions. A demurrer does not admit the truth of such conclusions. If they are to be regarded as allegations of fact, they are inconsistent with, and are negatived by, the other averments of the petition; for the notes themselves (copies of which are appended to the petition), in connection with the averments of the petition, evidence a transaction and contract to which the firm was not a party. They show that the moneys were loaned on the credit of notes executed by a single member of the firm, in his individual name, and by the plaintiff as his surety. They show that, if the plaintiff signed the notes as a surety, his sole principal was William McCreath. In the absence of any allegation of fraud or mistake, the plaintiff cannot be permitted by averment to contradict the plain terms of his own written contract. The notes must speak for themselves, and they purport to be made by and in behalf of William McCreath and the plaintiff only.

The questions raised by the demurrer to this petition are, then, as we think, substantially these: Where a partner, on the security of a note signed by him individually and by another as his surety, borrows money for the use of the partnership, and which is in fact ap-

plied to partnership purposes, does the money so borrowed become a partnership debt? And, if payment of the note be enforced against such surety, does he thereby acquire a right of action against all the partners, as his principals? Both upon principle and authority we think these questions must be answered in the negative. "Where one partner borrows money on his individual credit, and afterward applies it to the payment of partnership debts, or loans it to the firm, it does not entitle the original lender to consider himself a creditor of the firm, and to enforce payment against them." Jaques v. Marquand, 6 Cow. (N. Y.) 497 (per Sutherland, J., citing Ex parte Hunter, 1 Atk. 223; Parkin v. Caruthers, 3 Esp. 250). The plaintiff here became surety for an individual member of a firm, on an express separate contract made between him and Toberin. If the money borrowed was subsequently applied by McCreath to the use of the partnership, he, and not Toberin, thereby became the creditor of the firm. For moneys procured by McCreath on his individual credit, and used for the partnership benefit, there can be no doubt that he would be entitled to a credit in his account with the firm, and it would seem unreasonable that the other partner should, besides, be liable to the lender on a contract to which he was not even an ostensible party and of which he may have had no knowledge.

In Beaven v. Lewis, 2 Eng. Ch. 376, it was held that, if a partner borrows a sum of money and gives his own security only for it, it does not become a partnership debt by being applied to partnership purposes with the knowledge of the other partner.

The same was held in Willis v. Hill, 19 N. C. 231, 31 Am. Dec. 412. So, in a recent case in New York, it was held by the Court of Appeals that "where money is loaned upon the promissory note of one member of a copartnership, and upon his individual credit, the fact that the money was applied to the payment of the partnership debts does not constitute the lender a creditor of the firm. It is only in cases where the name used, and to which credit is given, is that adopted by the firm and used to designate the partnership, that it is held liable." National Bank of Salem v. Thomas, 47 N. Y. 15. See, also, Emily v. Lye, 15 East, 7. Such, we think, is the well-settled rule where the question arises between the lender and the partnership. And it cannot be otherwise where the surety of the borrower is the plaintiff. His principal can only be one who is liable for the debt. And, unless such liability attaches to the partnership, he cannot claim that the relation of principal and surety subsists between the partners and himself.

We are therefore of opinion that the court of common pleas did not err in sustaining the demurrer to the petition of the plaintiff below, and that its judgment was properly affirmed by the district court.

Judgment of district court affirmed.

YORKSHIRE BANKING CO. v. BEATSON et al.

(L. R. 5 C. P. D. 109.)

See ante, p. 157, for a report of the case.

MAFFET et al. v. LEUCKEL.

(Supreme Court of Pennsylvania, 1880. 93 Pa. 468.)

Assumpsit by F. Leuckel against W. R. Maffet and W. T. Rhoads, late partners as Maffet & Rhoads, for a sum alleged to be due to plaintiff by the firm. The case was referred to a referee, G. R. Bedford, Esq., who reported the facts as follows:

"That the defendants, during the year 1866, were partners engaged in building a section of the Lehigh & Susquehanna Railroad. That upon the 27th day of November, 1866, W. T. Rhoads, one of the defendant firm, applied to the plaintiff for $200, representing that he wished the same for the purpose of paying the men in the defendants' employ, and thereupon the said amount was advanced by the plaintiff, and the sum was used by Rhoads for the purpose mentioned; he giving the plaintiff a note, of which the following is a copy:

" '$200. Mauch Chunk, Pa., Nov. 27, 1866.

" 'One day after date I promise to pay to the order of F. Leuckel, at the First National Bank of Mauch Chunk, $200, without defalcation, for value received. W. T. Rhoads.' "

The referee in his report, inter alia, said:

"That a note given by one partner for a debt of the firm is not an extinguishment of the original debt, unless so agreed when the note was given, is too well settled to admit of argument. The burden of proof is upon the defendant to show that the note was taken in payment and satisfaction, and not as collateral security. See Mason v. Wickersham, 4 Watts & S. 100; Tams v. Hitner, 9 Barr, 441–448. As the referee conceives, it makes no difference, in principle, whether the debt is an antecedent one or one that is created at the time the security is given. It is true that it has been held that, if a partner borrow money and give his own security for it, it does not become a partnership debt by being applied to partnership purposes. It is treated as the discount of a note, and not the loan, and hence is not affected by the subsequent use to which the money is applied. See Graeff v. Hitchman, 5 Watts, 454. But the presumption of the advance on the credit of the individual partner may be rebutted; and where, as in this case, at the time of obtaining the money the reason for the loan and the uses to which it was to be applied were distinctly stated, and were understood by both the lender and the borrower, and the money was in fact so used, the inference is a fair one that the advance was on the credit of the partnership."

The referee was therefore of opinion "that, though the defendant firm are not liable on the note as such, yet they are responsible under the money counts, and hence that the plaintiff is entitled to recover in this action the amount mentioned in said note, with interest from the 27th day of November, 1866."

Exceptions were filed to the report of the referee, which the court dismissed, and confirmed the report, when the defendants took this writ.

PER CURIAM. There was nothing in the form of the note produced in evidence to preclude the plaintiff from showing that it was given for a partnership debt—that it was not accepted in satisfaction, but merely as collateral security. It matters not that the making of the note was cotemporaneous with the partnership debt. On the facts found by the referee, we are of opinion that the judgment was right.

Judgment affirmed.

BROOKE v. WASHINGTON.

(Supreme Court of Virginia, 1851. 8 Grat. 248, 56 Am. Dec. 142.)

MONCURE, J. The suit in which the decree from which the appeal in this case was taken was rendered was a suit brought to recover of dormant partners a debt for which the ostensible partners had given their bonds, but which the latter became unable to pay by reason of their insolvency. The following appear to be the facts of the case, so far as it is material to state them: In 1841 Perdue, Nichols, Brooke, and Jewell entered into partnership for carrying on the iron-making business in the county of Jefferson, and accordingly carried it on for about two years. Perdue and Nichols resided in the county of Jefferson, and were the ostensible partners. Brooke and Jewell were nonresidents of the state, and their names did not appear in the style of the firm, which was "Perdue, Nichols & Co." It does not appear to have been known to the appellee, nor generally, that Brooke and Jewell were partners; and it was proved that several suits were brought by different attorneys against Perdue and Nichols alone, as constituting the firm of Perdue, Nichols & Co., though it does not appear that there was any designed concealment of the fact that Brooke and Jewell were members of the firm. In May, 1841, the appellee, Washington, sold and conveyed to Perdue and Nichols 843 acres of land in Jefferson for $6,200, of which $1,100 was paid at the time, and for the balance they gave their bonds, payable in five annual installments, and gave a deed of trust on the land to secure the payment of the same. The cash payment was made by the check of Perdue, Nichols & Co., and entries were made on their books, bearing the same date with the deeds and bonds, to wit, the 1st of May, 1841, crediting Washington in account with the firm for $6,200, the purchase money of the land, and debiting him in the same account with $1,100, the

cash payment. During the operations of the partnership, for some 18 months after the purchase, about 5,000 cords of wood were cut from the land and used in the said operations. Portions of the land were also rented out, and the rents were received by the firm and entered on their books. Brooke had access to the books and looked into them, though it did not appear that he ever examined any account but his own. In December, 1842, Perdue and Nichols, in their individual names and by the partnership name of Perdue, Nichols & Co., executed a deed of trust to secure the debts of the firm which are enumerated. Three parcels of land, besides other property, were embraced in the deed; but the land bought of Washington was not included, and the debt due to him was not mentioned in the deed. In March, 1843, Washington filed his bill, charging that a large portion of the value of the land consisted in the timber and trees standing on it; that the object of the purchasers in buying it was to cut off the timber for fuel to supply their iron works; that they had cut down and carried off the timber and trees on the land, until it was of very little value; that he had no other security for the purchase money than the land itself, under the deed of trust; that the partnership had become insolvent and made a general assignment of their effects for the benefit of their creditors, and his only mode of redress to recover the balance due him was to charge the same on the individual partners; and that Brooke was a partner at the time of the sale, though he was then ignorant of the fact, the name of Brooke being withheld from the public—and seeking to charge said Brooke as a member of the firm for the balance of said debt. Afterwards an amended bill was filed, charging that Jewell also was a secret partner of the firm, and seeking to make him liable. Of all the defendants, Brooke alone filed an answer. He placed his defense upon the ground that the purchase was not made on account or upon the credit of the firm, or by his authority, and was not within the scope of the partnership, and, in the absence of any knowledge on the subject at the time it was made, "presumes it was by Perdue and Nichols, with the view of bringing it into the firm as a part of their share of the capital"; and he also objected to the jurisdiction of the court.

The circuit court, being of opinion that Brooke and Jewell were secret members of the firm, that that fact was unknown to the appellee at the time of the sale, that the land was purchased for partnership purposes, that the chief value thereof consisted in its timber required as fuel for the iron works, and therefore that such purchase was a transaction in the ordinary course of business in conducting the iron works, rendered a decree against all the parties for the balance due to Washington, after crediting the proceeds of the sale of the land. From that decree the appeal in this case was taken.

The case of Weaver v. Tapscott, 9 Leigh, 424, seems to rule this case, and to show that there is no error in the decree of the circuit court. In that case Weaver and Trimble were partners in the boating

business upon James river, between Rockbridge and Richmond. Trimble went to Buckingham and hired hands to be employed in the business, which were actually so employed during a portion of the time that the partnership continued, and for the hire he executed his bond, with Tapscott as surety. Trimble, the principal obligor, having become embarrassed and left the state, Tapscott, the surety, was compelled to pay the money, and filed his bill to recover it of the other partner, Weaver, who had not signed the bonds. He obtained a decree; and this court, consisting of five judges, unanimously affirmed it. Many expressions used by the judges in that case are very apposite to this. Parker, J., says: "A dormant partner, to whom a vendor gives no credit, and whose responsibility constituted no part of the consideration moving him to sell, is liable to the whole extent of engagement in matters which, according to the usual course of dealing, have reference to the business transacted by the firm. Robinson v. Wilkinson, 3 Price, 538; Saville v. Robertson, 4 T. R. 720. There can be no doubt that the hiring of hands to be employed in the boating business had immediate reference to the nature of the dealings between Trimble and Weaver. The trade in which they were engaged could not be carried on without hands, any more than without boats." "If Tapscott was ignorant of Weaver's being a partner, it brings this case within the influence of those upon secret partnership. Gow on Part. 176. If he knew it, but dealt with Trimble alone, without intending to release the partnership, it must be governed by the cases of Bond v. Gibson, 1 Camp. 185, and Gouthwaite v. Duckworth, 12 East, 421. It is only, I think, in cases where a separate credit is clearly given to one of the partners, to the exclusion of the rest, that the latter are absolved." "When one deals with a partner in matters relating to the partnership business, it ought to be inferred that he deals on the credit of the partnership, unless the circumstances prove that, though apprised of the partnership, he meant to give individual credit. It would be hard to hold him bound to prove that he knew of the partnership and dealt on its credit." "The presumption is in the affirmative; and to discharge the firm it ought to appear clearly that he gave credit to the individual alone, and intended to absolve the other partners." Cabell, J., says: "It is perfectly clear that Weaver was equally liable with Trimble, even if Tapscott, at the time of the contract, was ignorant of the fact that Weaver was a partner. And, if the fact of the partnership was known to Tapscott, Weaver is a fortiori liable, unless, indeed, it can be shown that Tapscott, with this knowledge, contracted on the individual credit of Trimble, in exclusion of that of Weaver. Nothing of the kind is attempted to be proved, and it cannot be presumed without proof. Weaver, therefore, was clearly liable on the hiring; and the cases of Sale v. Dishman, 3 Leigh, 548, and McCullough v. Summerville, 8 Id. 415, show that this objection was not extinguished by the execution of a bond by his partner." Tucker, P., referring to the arrangement alleged, that Weaver should find the

hands and Trimble the boats, says that, even if it was made between the parties, "yet the public had nothing to do with that arrangement, and, as Weaver was to get half the profits, he was responsible for the hires, since that interest in the profits ipso facto constituted him a partner." Again he says: "'It is possible,' says Chief Baron Macdonald, in Barton v. Hanson, 2 Camp. 97, 'that separate credit may be given to one of two partners individually; but the presumption of law is otherwise, and that presumption must be rebutted by very clear evidence. And this is reasonable; for why should the partner desire to bind himself and absolve the concern? Or why should the dealer with him prefer to bind him individually, when, if bound as a partner, he is personally not less bound, and there is the additional security of his partner?' In this case it is absurd to suppose that Tapscott took Trimble's individual responsibility, if he knew of Weaver's connection with him; and, if he did not know of it, then the execution of a sealed instrument could not have been with a view to indicate his individual responsibility, in contradistinction to that of the concern."

These copious extracts are made from the opinions of the judges in Weaver v. Tapscott, because, nomine mutato, they are as applicable to this case as they were to that, and because they leave little or nothing more to be said in this case. It seems to be difficult to find a distinction between that case and this, unless it be in the fact that in that case the bonds were given for negro hire, and in this they were given for the purchase money of land; and that is a distinction without a difference, at least in principle. * * *

In the case now under consideration the evidence is conclusive that the land was bought for partnership purposes, paid for in part, and intended by the purchasers to be paid for entirely, out of partnership funds, and applied to partnership purposes. The purchase was within the scope of the partnership, for the operations of the furnace could not be carried on without fuel; and the best mode of obtaining it was to purchase land in the neighborhood well covered with wood, as was the land of Washington. All the partners are therefore bound for the purchase money on the authority of the cases before cited. * * *

The court is therefore of opinion to affirm the decree.

Decree affirmed.[1]

BISEL et al. v. HOBBS et al.

(Supreme Court of Indiana. 1843. 6 Blackf. 479.)

SULLIVAN, J. Assumpsit by the appellees against the appellants for goods, etc., sold and delivered. Plea, the general issue. At the October term, 1842, there was a trial of the cause, and a verdict was rendered for the appellants. A new trial was granted at the April term, 1843. The appellees obtained a judgment.

[1] North Pennsylvania Coal Co.'s Appeal, 45 Pa. 181, 84 Am. Dec. 487, contra.

At the request of the plaintiffs the court gave the following instructions to the jury, to which the defendants excepted, viz.: "If the jury believe from the evidence that Peter Bisel and Selden Martin were in partnership in a distillery at the time the corn was purchased, and if they believe it was purchased by one of the partners for the use of the firm, they should hold both liable, although the plaintiffs did not know at the time of the existence of the partnership. There was no error in that instruction. The principle asserted is that to give to the plaintiffs a right of action against the defendants for the corn sold and delivered to one of the defendants for the use of the firm, it was not necessary that the plaintiffs should know, at the time of the sale and the delivery, that the defendants were partners. This is undoubtedly the law. Even in respect to secret partnerships, where the credit is given to the ostensible party, if it be in the course of the business of the partnership and for the common benefit, the secret and silent partners are bound; for those who are to receive the benefit are also bound to bear the burthens. Bank of U. S. v. Binney et al., 5 Mason (U. S.) 176, Fed. Cas. No. 16,791. In the case of Swan et al. v. Steele et al., 7 East, 210, it is said there may be partnerships where none of the existing partners have their names in the firm. Third persons may not know who they are; and yet they are all bound by the acts of any of the partners in the name of the partnership. The same doctrine is recognized in Vere et al. v. Ashby et al., 10 B. & C. 288.

The judgment is affirmed.

RICHARDSON et al. v. FARMER et al.

(Supreme Court of Missouri, 1865. 36 Mo. 36, 88 Am. Dec. 129.)

WAGNER, J. This was an action brought in the Greene county circuit court by the respondents against the appellants. The petition is founded on two notes, and contains two counts. In the title to the cause Jopes and Farmer are declared to be partners in trade doing business under the firm name of W. H. Jopes. The first count then avers that defendants executed the note in their firm name in payment for a bill of drugs and medicines bought by them of plaintiffs and used in their business. The second count is the same as the first, except that it is alleged that the defendants executed the note sued on in their firm name of W. H. Jopes.

Jopes did not appear to the action. Farmer filed his answer, denying the existence of the partnership under the name and style of W. H. Jopes, or under any other name or style, and averring that the notes sued on were the separate and individual notes of the said Jopes, and executed for his own benefit. A jury was impaneled to try the issue, and at the instance of the plaintiff the court gave several instructions, the fifth and last of which is as follows: "A dormant partner is lia-

ble, whenever found, for goods purchased and used for the benefit of the firm, and the accepting by plaintiffs of the notes sued upon in payment for a bill of drugs purchased by W. H. Jopes of them, and the acceptance of said note in payment therefor, if said drugs were used for the partnership benefit of W. H. Jopes and W. B. Farmer, may not be an acceptance of the liability of W. H. Jopes alone, or an exclusive credit to him, but was binding upon all for whom W. H. Jopes acted." To the giving of all of said instructions the defendants at the time excepted.

Defendants then asked the court to give several instructions in their behalf, all of which were given except the first; and to the decision of the court in refusing to give said first instruction they also excepted.

The jury found a verdict for plaintiffs, and defendants made their motion in arrest of judgment, and also a motion for a new trial, both of which motions were overruled by the court, and defendants duly excepted, and Farmer now prosecutes his appeal in this court.

1. The instructions given for plaintiffs below, respondents here, taken together, fairly presented the law to the jury. The first instruction asked by defendants, which the court refused, whilst enumerating a correct abstract principle of law, is not applicable to this case. The other instructions prayed for, and which were given, were of the most favorable character. The great mistake made in the line of argument pursued by the appellants' counsel is not paying proper regard to the obvious distinction between partnerships where all the members are open and notorious and those where some are silent or dormant. Parties have a right to make their own contracts, to assume extraordinary liabilities, or to take inferior securities when they might have insisted on greater ones. When they are fully cognizant of all the facts, and a specific credit given, or a personal liability incurred, the law will not attempt to interfere and set up a new agreement for them, but will leave them to abide by their own engagement. The maxim "modus et conventio vincunt legem" then fitly applies.

The case of Sylvester v. Smith, 9 Mass. 119, merely decides that where an agreement was entered into between two persons, one to find the stock and the other to do the labor, and the profits were to be divided among them equally, an action might be maintained against the person buying the stock, notwithstanding the other person who was to perform the labor was not joined with him; Judge Parker saying that, "notwithstanding a copartnership, either of the copartners may undoubtedly contract on his own account, and make himself liable for merchandise bought for the copartnership account, if the vendor chooses to accept him." In Loyd v. Freshfield, 2 Car. & P. 325, Abbott, C. J., held that, if money be lent to one partner on his individual credit, the fact that it is applied in discharge of the liabilities of the firm will not enable the lender to sue the firm for its repayment. In Le Roy v. Johnson, 2 Pet. (U. S.) 186, 7 L. Ed. 391, Hoffman &

Johnson were copartners in trade, a bill of exchange was drawn by Hoffman after the dissolution of his partnership with Johnson, and the proceeds of the bill went to pay and did pay the partnership debts of Hoffman & Johnson, which Hoffman on the dissolution of the firm had assumed to pay. It was decided by the court that the holder of the bill, after its dishonor, could have no claim on Johnson in consequence of the particular appropriation of the proceeds of the bill. It was admitted that, if one partner contract with a third person in the name of the firm after the dissolution, but the fact of such dissolution not being made public or known to such third person, the law would consider the contract as being made with the firm and on their credit. But when the partner made an agreement or entered into a contract with another in his individual name, and upon his sole personal responsibility, it was of no importance for the other to know that the partnership was dissolved, because he was dealing, not with the firm and upon their credit, but with the individual with whom he was acting upon his own credit.

It will be perceived that in all the foregoing cases the partnerships were known, and their existence brought home to the knowledge of the parties dealing with them. They were placed in a situation to exercise their right of election, and were unquestionably bound by their own deliberate acts. They were not deprived of the right of choosing their debtors, and there is no hardship or injustice in holding them to their choice. But in the case of a dormant or secret partner, while the credit is manifestly given to the ostensible partner because no other is known to the party, yet the credit is not deemed to be exclusive; the creditor having had no opportunity to elect or choose his debtor.

The credit will not, therefore, be presumed to have been given on the sole and separate responsibility of the ostensible partner, but will bind all for whom the partner acts, if done in their business and for their benefit. Story on Part. § 138; 1 Story on Cont. § 226; Thompson v. Davenport, 9 Barn. & C. 78; Bracken v. March, 4 Mo. 74; Raymond v. Mills, 2 Metc. (Mass.) 319; U. S. Bank v. Binney, 5 Mason (U. S.) 176, Fed. Cas. No. 16,791; Winship v. Bank of U. S., 5 Pet. (U. S.) 529, 8 L. Ed. 216. * * *

The judgment is affirmed.

SECTION 4.—COMMENCEMENT AND DURATION OF LIABILITY.

I. ASSUMPTION OF FIRM OBLIGATIONS.

WOLFF v. MADDEN et al.

(Supreme Court of Washington, 1893. 6 Wash. 514, 33 Pac. 975.)

Action by Samuel Wolff against M. J. Madden and Joshua Green on an acceptance of the Midland Lumber Company, a partnership composed of M. J. Madden and Wiley J. Brown, of which firm defendant Green became a member after the date of such acceptance. Defendant Madden was not served with summons, and did not appear. From a judgment in favor of plaintiff, against defendant Green, the latter appealed.

DUNBAR, C. J. It is not necessary for us to notice appellant's objections to respondent's contention that the relation assumed by appellant towards the Midland Lumber Company was that of an incoming partner; for, assuming, for the purposes of this decision, that the jury correctly found upon that proposition, we are unable to find anything in the record which would bind him as an incoming partner to pay debts of the partnership which were contracted prior to his connection with the partnership. * * * Considered, then, as an incoming partner, is he responsible for pre-existing debts of the company? It is a universally conceded doctrine that, when a new member is admitted to a firm, he becomes one of the firm for the future, and not for the past. There is not only no presumption that the incoming partner assumes pre-existing debts, but the presumption is that he does not. Without citing authorities, which are uniform on this subject, the rule seems to be briefly and concisely stated by Lindley on Partnership (volume 1, § 208) as follows: "In order to render an incoming partner liable to the creditors of the old firm, there must be some agreement, express or tacit, to that effect entered into between him and the creditors, and founded on some sufficient consideration. If there be any such agreement, the incoming partner will be bound by it, but his liabilities in respect of the old debts will attach by virtue of the new agreement, and not by reason of his having become a partner." In this case there is no showing of anything that was said or done by appellant that could reasonably be construed into a promise to become liable for the debt sued upon. The testimony of himself and the creditors proves no more than that appellant, as manager for the company, recognized the company's indebtedness. He could do no less than this, as it was a fact of which he was no doubt cognizant, but this is a different proposition entirely from acknowledging his

personal liability; and, even if there could be any such construction placed upon his acts or words, there is no showing of, or attempt to show, any consideration for the promise. In our judgment, the testimony offered by plaintiff was utterly insufficient to sustain the judgment, and defendant's motion for a nonsuit should have been granted. * * * The judgment is reversed, and the cause remanded to the lower court, with instructions to grant defendant's motion for a nonsuit, as prayed for.

R. S. CROSS v. BURLINGTON NATIONAL BANK.

(Supreme Court of Kansas, 1876. 17 Kan. 336.)

BREWER, J. This action was on a note given by D. Cross & Sons to the defendant in error. The case was tried by the court, without a jury. No special findings were made, but only a general finding in favor of the bank. * * *

But the point of difficulty lies in the fact that the loan for which this note was given was originally made several months prior to the time at which it is claimed plaintiff in error joined the firm, and it is said that an incoming partner is not liable for a prior debt of the firm without a special promise. As Chancellor Kent says, in volume 3 of his Commentaries, at page 36: "It is a general and well-established principle that, when a person joins a partnership as a member, he does not, without a special promise, assume the previous debts of the firm, nor is he bound by them." In reference to this, these facts appear: The firm of D. Cross & Sons was in existence at least as far back as 1871, and engaged in the flouring mill business. The firm then consisted of D. Cross, S. K. Cross, and Thomas Cross. In the spring of 1872 the firm borrowed $3,500 of the bank, and gave their 60-day note therefor. The loan was continued by renewals of the note until February 26, 1873, when the note in controversy was given. In the summer of 1872 Thomas Cross went out of the firm; and in the fall of 1872, as claimed, plaintiff in error became a partner. The name of the firm was not changed. Now, while an incoming partner does not by the mere fact of joining the firm become liable for its prior debts, yet he may assume such liability, and it is a question of fact whether he did so. And very slight testimony, the books say, will be sufficient to show that he did. Thus, in Ex parte Jackson, 1 Ves. Jr. 131, Lord Thurlow said: "If any interest had been paid upon that bond by both, I should have considered it as adopting the debt, and making the partnership liable for it. * * * If one man, having debts, takes another into partnership with him, a very little matter respecting those debts will make both liable." And in Parsons on Part. § 435: "Whether the new incoming partner has assumed the old debts is sometimes a difficult question of law and fact. It certainly may be

implied by circumstances; and what circumstances should in any case imply it is a question partly for the court, and partly for the jury. Paying of interest on a debt, or a knowledge without objection that the new firm pays the interest, would warrant a jury in finding such an assumption of the old debt; and perhaps any single fact of a like kind would have the same effect." See, also, Story on Part. §§ 152, 153; Updike v. Doyle, 7 R. I. 447; Ex parte Peele, 6 Ves. Jr. 601; Ex parte Williams, Buck, 16; Ex parte Freeman, Buck, 471. And there is manifest justice in this. Where one joins a partnership, as in this case, he makes himself a part of an entity already existing, which has acquired certain property and business, and in acquiring it has incurred certain indebtedness. The firm owns the property, holds the business, and owes the debts. He becomes one of that firm. Should it require much evidence to show that in entering that firm he identifies himself fully with it, becomes in all respects a part of it, and shares in its obligations, as well as in its property and business? It is true that as to the other partners there is a rearrangement of interests; but as to the property and business it is a continuous thing. When one buys a share in a corporation, he buys an interest subject to debts. And, while there is not the same legal obligation in entering a firm, there is much of practical similarity. Applying that rule to this case, we must sustain the judgment. The plaintiff in error knew of the existence of this debt. The interest on it was, without any objection by him, charged up to the firm by the bank and entered in its pass book. Thus appears the very matter specified by Parsons as sufficient to warrant a finding of the assumption of the debt. Again, while he did not sign the new note, and was not present when it was signed, he knew that the bank was seeking a renewal, and made no objection to it. The note was executed in the name of the firm, and was prima facie, therefore, binding on all the members of the firm at the time of its execution. It was a negotiable promissory note, at 90 days. It was such a note as, so far as anything in the record shows, he would naturally expect a bank to take. For banks, as every one knows, as a rule ask negotiable paper. Negotiated for value before due, it would be good against all those who were members of the firm at the date of its execution. With this before him, he gives no caution to the bank, and makes no objection to the renewal. After all, there is but a question of fact in regard to the partnership, and the assumption of the partnership debts; and, being but a question of fact, it is a matter for the determination of the trial tribunal. And, as there was ample testimony to sustain its finding, we must affirm it, although the testimony of the two Crosses is plain, direct, and positive against it.

The judgment will be affirmed.

HICKS et al. v. WYATT et al.

(Supreme Court of Arkansas. 1861. 23 Ark. 56.)

Hicks and Wyatt being partners in the mercantile business, Hicks sold his interest in the firm to one Thompson and retired. Wyatt continued the business with Thompson under the firm name of Wyatt & Thompson. This new firm covenanted with Hicks to pay all outstanding debts of Hicks & Wyatt and to hold said Hicks harmless from all liability. Hicks, Arrington & Co. sued Wyatt & Thompson for a debt due plaintiffs from Hicks & Wyatt. In the trial court judgment was rendered in favor of defendants. Plaintiffs appeal.

ENGLISH, C. J. * * * Hicks, Arrington & Co. insist that * * * by virtue of the covenant above referred to the firm of Wyatt & Thompson became liable to pay that debt, as well as all other debts of the firm of Hicks & Wyatt. But, if this be conceded to be true, it does not follow that the firm of Hicks, Arrington & Co. had the right of action for the $66.66, or any part of it, against the firm of Wyatt & Thompson. There was no privity of contract between these two firms. Wyatt & Thompson covenanted with Hicks to pay all of the debts of the firm of Hicks & Wyatt, and to save him harmless on account of said debts, and, if they failed to pay the debt in question, Hicks had his remedy against them for breach of their covenant; but Hicks, Arrington & Co., who were not parties to the covenant, had no right of action against the firm of Wyatt & Thompson. Their remedy was against the firm of Hicks & Wyatt, and, Hicks being a member of both firms, the remedy was in equity, and not at law. The judgment must be affirmed.[1]

ARNOLD et al. v. NICHOLS.

(Court of Appeals of New York, 1876. 64 N. Y. 117.)

Appeal from order of the General Term of the Supreme Court in the First Judicial Department, reversing a judgment in favor of plaintiff entered upon a verdict, and granting a new trial.

This action was brought against the defendants, as members of the firm of J. W. Bowen & Co., to recover an indebtedness of said Bowen to plaintiff's testator, which, as alleged in the complaint, the said firm

[1] In holding that the firm creditor cannot take advantage of a promise, not made to him, to assume partnership debts, the court in Shoemaker Piano Mfg. Co. v. Bernard, 2 Lea (Tenn.) 358, said: "The rule stands upon the principle of assent by the party to be charged and consent of the creditor to accept the new liability." In a similar case, Parmalee v. Wiggenhorn, 6 Neb. 322, the court said: "There must be a novation before the new firm is liable; and the new contract must receive the consent of all the parties, and must have the effect to extinguish the old contract and create a new liability of debtor and creditor, * * * and such new contract must be based on some consideration."

had assumed and agreed to pay in consideration of the transfer to the firm by said Bowen of the property and assets of his business.

EARL, J. For some years prior to the 15th day of August, 1867, the defendant Bowen had been engaged in the city of New York in the business of importing and dealing in fancy goods, and on that day the plaintiff's testator, Hinman, loaned to him to be used in his business the sum of $2,000. Bowen continued in business alone until January, 1868, when he formed a copartnership with the defendant Nichols, and Bowen and Nichols, under the firm name of J. M. Bowen & Co., continued to carry on the business until May, 1869, when they dissolved. At the time of the formation of the copartnership, the evidence tends to show, and we must assume that the jury found, that Bowen transferred his business assets to the firm of J. M. Bowen & Co., and that in consideration thereof the firm assumed and agreed to pay certain specified debts of Bowen, among which was Hinman's debt for the money loaned as above stated. It was expected at the time that the assets would exceed the debts assumed by the firm by at least $30,000, and this excess of $30,000 was to be credited to Bowen on the books of the firm as his share of capital to be contributed. The assets were not as large as expected, but were shown to be more than sufficient to pay all the debts assumed. They were first to be used to pay the debts, and the balance, whatever it might be, was to be credited to Bowen.

Bowen transferred to the firm the assets to which his creditors had the right to look for the payment of their claims, and hence the promise of the firm to pay such claims must be deemed to have been made for their benefit. It was not made to exonerate Bowen from the payment of his debts, and not primarily nor directly for his benefit, as his property was to be taken to pay the debts, and he was still to remain liable as one of the principals to pay them. This case is, therefore, unlike the case of Merrill v. Green, 55 N. Y. 270, and the action is maintainable upon the principles laid down in the case of Lawrence v. Fox, 20 N. Y. 268, and also recognized in Burr v. Beers, 24 N. Y. 178, 80 Am. Dec. 327, Thorp v. Coal Co., 48 N. Y. 253, and Claflin v. Ostrom, 54 N. Y. 581. Hinman had the right to adopt the promise made expressly for his benefit. * * *

The order of the General Term must be reversed, and the judgment entered upon the verdict affirmed, with costs.

Order reversed, and judgment accordingly.

McAREAVY v. MAGIRL.

(Supreme Court of Iowa, 1904. 123 Iowa, 605, 99 N. W. 193.)

Action in equity to enjoin collection of a judgment. Decree for plaintiff, and defendant appeals. Reversed.

WEAVER, J. The nature of the controversy here presented may be stated as follows: In the year 1889 one D. R. Magirl and the plaintiff, McAreavy, were partners in business. The firm borrowed the sum of $200 from Julia McEnany (now Julia Magirl, the defendant herein), and made to her a promissory note for that amount, signed in the firm name. Thereafter, and while said note was still outstanding and unpaid, the partnership was dissolved, D. R. Magirl taking the firm property and agreeing to pay the firm debts, of all which the defendant had notice. Later Magirl married the defendant. On July 28, 1898, about eight years after the maturity of the note, Mrs. Magirl brought suit thereon against McAreavy, without making her husband a defendant, and obtained judgment thereon in the sum of $416 and costs. The judgment has never been paid. On November 9, 1900, more than 10 years after the maturity of the note, which had been put in judgment against McAreavy, the latter began this suit, alleging that by virtue of the terms of dissolution of partnership by which Magirl assumed and agreed to pay this debt the latter became the principal debtor, and plaintiff thereafter stood in the relation of surety only. He further alleges that, plaintiff having failed to put the note in judgment against her husband, her right of action therein has become barred by the statute of limitations, and, having thus negligently allowed the principal debtor to escape liability, the plaintiff, as surety, is also released, and upon this theory he asks to have the collection enjoined, and the judgment canceled.

As members of the partnership, both plaintiff and D. R. Magirl were equally bound as principal debtors to the payee of the note. When Magirl took the partnership assets and assumed payment of the partnership debts, then, as between him and the plaintiff, he became liable as the sole principal, and plaintiff became his surety for the payment of said note. This proposition is upheld by all the authorities, and is not denied by the appellant. When we advance the next step, and inquire whether this change in the relations existing between the partners affects in any manner their relation to the holder of the note, we find a marked variance of views. The courts of several states—notably New York and Michigan—hold to the view that, when a partner retires from a firm under such an agreement, and notice thereof is brought home to the creditor, the latter is bound to recognize the new relations between the members of the late partnership, and any indulgence thereafter shown to the partner assuming the debt which would have the effect to discharge an original surety will operate to discharge the retiring partner from further obligation. Millerd v.

Thorn, 56 N. Y. 402; Colgrove v. Tallman, 67 N. Y. 95, 23 Am. Rep. 90; Smith v. Sheldon, 35 Mich. 42, 24 Am. Rep. 529. See, also, Leithauser v. Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336; Brandt on Suretyship (2d Ed.) § 36; Stearns on Suretyship, p. 24; Baylies on Suretyship, pp. 40, 481; Shumaker on Partnership, 341, 342. The reasoning by which this view is supported is very forcibly stated by Folger, J., in the Colgrove Case, and by Cooley, C. J., in the Smith Case, and the writer of this opinion would be content to accept it as authoritative. The majority of the court prefers to follow the other line of authorities as announcing the sounder principle, and the result arrived at cannot be said to be essentially unjust. It is in accord with the views expressed by many courts and law writers, and is bottomed upon the proposition that, the liability of the partners as principal debtors being fixed by the terms of the original contract, it is not competent for them by any agreement between themselves to change the nature of that liability, or impose upon the creditor, without his consent, any new or additional obligation or duty, a neglect of which may work a discharge of one of such debtors from his obligation to pay. The agreement between the partners by which one of them assumes to pay the entire debt is regarded res inter alios acta as respects the creditor, who is neither benefited nor prejudiced thereby. Barnes v. Boyers, 34 W. Va. 303, 12 S. E. 708; Buchanan v. Clark, 10 Grat. (Va.) 164; Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; 2 Collyer on Partnership, c. 24, § 596; 1 Collyer on Partnership, c. 17, § 407; Story on Partnership, § 334; Parsons on Partnership (4th Ed.) §§ 296, 313, 324; Shapleigh Hardware Co. v. Wells, 90 Tex. 110, 37 S. W. 411, 59 Am. St. Rep. 783; Hall v. Jones, 56 Ala. 493; White v. Boone, 71 Tex. 712, 12 S. W. 51. * * *

There is a class of cases of which Lauman v. Nichols, 15 Iowa, 161, is an example, in which it is held that a person signing a note or other obligation as a joint maker may, nevertheless, allege and prove that he joined in the execution of the instrument as surety only, and, upon notice of that fact being given to the holder of such obligation, even after it is delivered, he is bound to recognize the true relations of the makers; but until such notice is received he may enforce payment against all makers as principal debtors. At first blush these two lines of cases may seem inconsistent, but they are clearly distinguishable. In the former the debtors seek, by an agreement between themselves alone, to change their relations to the debt without the consent of the creditor; while in the latter the original and true relation of the makers to the debt is unchanged, and the rights and position of the surety are protected and made effectual from the time notice of such relation is brought home to the creditor. This distinction is recognized and explained in Shapleigh v. Wells, supra, and Rawson v. Taylor, supra.

Having found that plaintiff herein is not entitled to the rights of a surety as against Mrs. Magirl, it is unnecessary to consider other matters presented in argument. It is elementary that mere indulgence

by the creditor to one joint debtor will not serve to discharge another joint debtor from his obligation to pay. The claim has been put in judgment against the plaintiff, and, save upon the theory of his suretyship, which we find is unsound, he offers no reason why it should be canceled or annulled.

The decree of the district court is therefore reversed.

SMITH v. SHELDEN et al.

(Supreme Court of Michigan, 1876. 35 Mich. 42, 24 Am. Rep. 529.)

COOLEY, C. J. Prior to June, 1867, Eldad Smith, Isaac Place, and Francis B. Owen were partners in trade under the firm name of Place, Smith & Owen, and as such became indebted to defendants in error in the sum of $969 on book account.

In the month mentioned the firm was dissolved by mutual consent; Place purchasing the assets of his copartners and agreeing to pay off the partnership liabilities, including that to the defendants in error. On the 2d day of the following month Place informed the defendants in error of this arrangement, and that he had taken the assets and assumed the liabilities of the firm, and they, without the consent or knowledge of Smith and Owen, took from Place a note for the amount of the firm indebtedness to them, payable at one day with 10 per centum interest. They did not agree to receive this note in payment of the partnership indebtedness; but they kept it and continued their dealings with Place, who made payments upon it. The payments, however, did not keep down the interest. Place, in 1872, became insolvent and made an assignment, and Smith was then called upon to make payment of the note. This was the first notice he had that he was looked to for payment. On his declining to make payment, suit was brought on the original indebtedness, and judgment recovered.

On behalf of Smith it was contended that by the arrangement between Place and his copartners the latter, as between the three, became the principal debtor, and that from the time when the creditors were informed of this arrangement they were bound to regard Place as principal debtor and Smith and Owen as sureties, and that any dealing of the creditors with the principal to the injury of the sureties would have the effect to release them from liability. * * *

For a determination of the question whether Smith and Owen were entitled to the rights of sureties, it seems only necessary to point out the relative position of the several parties as regards the partnership debt. Place, by the arrangement, had agreed to pay this debt, and as between himself and Smith and Owen he was legally bound to do so. But Smith and Owen were also liable to the creditors equally with Place, and the latter might look to all three together. Had they done so, and made collections from Smith and Owen, these parties would

have been entitled to demand indemnity from Place. This we believe to be a correct statement of the relative rights and obligations of all.

Now a surety, as we understand it, is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial in what form the relation of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken. The relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor, or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but, if he knows that one party is surety merely, it is only just to require of him that in any subsequent action he may take regarding the debt he shall not lose sight of the surety's equities.

That Smith and Owen were sureties for Place, and the latter principal debtor, after the dissolution of the copartnership, seems to us unquestionable. It was then the duty of Place to pay this debt and save them from being called upon for the amount. But if the creditors, having a right to proceed against them all, should take steps for that purpose, the duty of Place to indemnify, and the right of Smith and Owen to demand indemnity, were clear. Every element of suretyship is here present, as much as if, in contracting an original indebtedness, the contract itself had been made to show on its face that one of the obligors was surety merely. As already stated, it is immaterial how the fact is established, or whether the creditor is or is not a party to the arrangement which establishes it.

This view of the position of the parties indicates clearly the right of Smith and Owen to the ordinary rights and equities as sureties. The cases which have held that retiring partners thus situated are to be treated as sureties merely have attempted no change in the law, but are entirely in harmony with older authorities, which have only applied the like principle to different states of facts where the relative position of the parties as regards the debt was precisely the same. We do not regard them as working any innovation whatever. The cases we particularly refer to are Oakeley v. Pasheller, 4 Cl. & Fin. 207; Wilson v. Lloyd, L. R. 16 Eq. Cas. 60, and Millerd v. Thorn, 56 N. Y. 402.

And it follows, as a necessary result from what has been stated, that Smith and Owen were discharged by the arrangement made by the creditors with Place. * * * This is the legal view of such a transaction, and in most cases it works substantial justice. The judgment must be reversed, with costs, and a new trial ordered.

PRESTON v. GARRARD.

(Supreme Court of Georgia, 1904. 120 Ga. 689, 48 S. E. 118, 102 Am. St. Rep. 124.)

Garrard brought suit against J. W. Preston and E. M. Brown, as partners, on a promissory note dated February 24, 1899, and due one year after date. Preston filed a plea setting forth that the firm was dissolved on December 27, 1900, all of the debts of the firm being assumed by Brown; that the dissolution was known to plaintiff's agent, who acted for her in making the loan for which the note was given, and that the fact that Brown had assumed the debts of the firm was also known to this agent, who recognized Brown as the principal debtor by treating with him as such thereafter; that on June 18, 1902, plaintiff, through her agent, agreed with Brown, upon a sufficient consideration, that she would extend the time of payment of the note sued on to February 24, 1903; that this extension was granted without the knowledge or consent of the defendant. The plea alleges that by reason of these facts the defendant became, after the dissolution of the firm, merely a surety for Brown upon the debts of the firm which he had assumed to pay; and that the extension of the time of payment of the note sued on without the defendant's knowledge or consent released him from all liability on the debt. The court struck this plea on oral motion, and the defendant excepted.

Cobb, J. It is well settled that, where a partnership is dissolved by the retirement of one of the members, and the continuing partner assumes the payment of the debts of the firm, the retiring partner, as between himself and his copartner, is no longer a principal debtor, but merely a surety for the latter upon the debts of the firm. See 22 Am. & Eng. Enc. L. (2d Ed.) 185; Shumaker on Part. p. 342; 1 Bates on Part. § 532. Some disagreement among the courts has arisen in fixing the rights of creditors after dissolution by the retirement of one member and the assumption of the debts by the other. Of course, if a creditor is a party to the agreement made between the partners, he will be bound by it, and must deal with the retiring partner as a surety. All are agreed as to this. The difficulty has arisen in determining whether mere knowledge by the creditor of the dissolution and the agreement of the partners would require him to deal thereafter with the retiring partner as a surety with reference to past transactions of the firm. The case of Oakeley v. Pasheller, 4 Cl. & F. 207, a decision made by the House of Lords in 1836, was supposed to have held that mere knowledge of these things by the creditor would require him to treat the retiring partner as a surety, and that, if he extended the time of payment of his debt without the retiring partner's knowledge or consent, he would be released. But in the case of Swire v. Redman, L. R. 1 Q. B. 536, Cockburn, C. J., shows very clearly that the House of Lords did not, in Oakeley v. Pasheller, intend to

rule as was supposed, but merely to hold that the retiring partner would be released only in the event the creditor consented to the arrangement between the partners. Some American courts have followed what was supposed to be the ruling in Oakeley v. Pasheller, and others have adopted the decision in Swire v. Redman, which was to the effect that something more than mere knowledge on the part of the creditor is required—that he must expressly consent to the arrangement between the partners before he will be bound by it; and that in the absence of such consent he can deal with the retiring partner as a principal debtor and as an active partner so far as past transactions are concerned. Cases like Swire v. Redman proceed on the theory that when a creditor's rights once become fixed by contract no agreement on the part of the other parties to the contract can affect those rights or change their relation to the creditor so far as he is concerned; that it is wholly immaterial that the creditor was informed of such an agreement; that the partnership still continues relatively to his debt; and that any arrangement which he makes with the continuing partner in behalf of the partnership will be binding on the other. The other line of decisions holds that whenever the relationship of principal and surety arises between partners after dissolution and the assumption by one partner of the debts of the firm, every one having notice of the dissolution and the agreement between them is bound to take notice of the relationship which the law creates, and act accordingly; that while a creditor holding an obligation of the firm may regard the retiring partner as an active partner, so far as his debt is concerned, as long as he does nothing to affect the status of his claim, the moment he, with knowledge of the dissolution and the agreement, does anything which would release an ordinary surety, the retiring partner will be entirely released from his obligation; that this is no hardship on the creditor, because he can protect himself by granting no indulgence to the continuing partner, who has become alone the principal debtor, or doing anything without the retiring partner's consent which would affect the status of the claim to the prejudice of the surety partner. The following are some of the decisions dealing with the subject: Rawson v. Taylor, 30 Ohio St. 389, 27 Am. Rep. 464; Gates v. Hughes, 44 Wis. 332; Millerd v. Thorn, 56 N. Y. 402; Ridgley v. Robertson, 67 Mo. App. 45; Barber v. Gillson, 18 Nev. 89, 1 Pac. 452; Maier v. Canavan, 8 Daly (N. Y.) 272; Johnson v. Young, 20 W. Va. 614; Williams v. Boyd, 75 Ind. 286; Leithauser v. Baumeister, 47 Minn. 151, 49 N. W. 660, 28 Am. St. Rep. 336; Whittier v. Gould, 8 Watts (Pa.) 485; Wilde v. Jenkins, 4 Paige (N. Y.) 481; Thurber v. Corbin, 51 Barb. (N. Y.) 215; National Cash Register Co. v. Brown, 19 Mont. 200, 47 Pac. 995, 37 L. R. A. 515, 61 Am. St. Rep. 498; Smith v. Shelden, 35 Mich. 42, 24 Am. Rep. 529. * * * Previous decisions of this court have, however, settled that the rule to be followed in this state is the one supposed to have been announced in Oakeley v. Pasheller. * * * The extension of the time of payment,

under the circumstances alleged in the plea, had the effect of releasing the defendant; and the court erred in striking the plea.

Judgment reversed.

II. Novation.

LYTH v. AULT & WOOD.

(Court of Exchequer, 1852. 7 Exch. 669.)

Action for goods sold and delivered by plaintiff to defendants. Defendant Ault pleaded that the goods were sold to defendants as partners; that afterwards defendants dissolved their partnership; that Wood continued the business alone; that it was agreed between plaintiff and defendants that in consideration of £12 part payment on said indebtedness and the promise by Wood to assume and pay the balance the plaintiff would release Ault from further liability and look only to Wood. Verdict for defendant on the plea. Motion for rule on defendant to show cause why judgment for plaintiff should not be entered on the plea non obstante veredicto.

Parker, B. * * * The principle which governs this case is to be found expounded in Thompson v. Percival. It is clear that where there is an accord and satisfaction, by the debtor agreeing to give something totally different in its nature from the debt, and which the creditor agrees to accept in satisfaction of the debt, the court cannot inquire into the value of that which is the subject-matter of the new agreement, and therefore there is nothing to prevent the parties from agreeing that a horse, or bill of exchange, or any other commodity, shall be given in satisfaction of a larger demand. There is a very strong case to be found in Dyer, of Andrew v. Boughey, Dyer, 75a, where, to a declaration for delivering 373 pounds of bad wax upon an assumpsit for 400 pounds of good wax, stating half the price to have been paid in hand, the rest to be paid upon a day agreed, a plea of 20 pounds of wax given and accepted in satisfaction was held good. The court proceeded upon the ground that they were not at liberty to go into the value of the consideration of the new agreement, provided the thing differed from the debt itself. The law leaves the parties to their bargain. Now it cannot be doubted that the sole security of one of two joint debtors may be more beneficial than the joint responsibility of both. In the latter case you are not entitled to sue one with safety, for the defendant may plead in abatement the nonjoinder of his co-contractor. In case of the bankruptcy of one of the partners, there would also be a difference. In the case put by my Lord Chief Baron of two debtors, where one is a rich old man and the other is young and without property, it might be much more advantageous to the creditor to have his sole remedy against the former, for he would

have the security of the personal and real estate of the rich debtor, which he would not have at law in case the old man were to die first. Where there is more than one debtor, the creditor's remedy is different. There is, therefore, no doubt that the thing substituted is altogether different from the original debt. In Thompson v. Percival it is said by the Court of King's Bench that in the case of Lodge v. Dicas the difference between the joint liability of two and the separate liability of one does not appear to have been brought under the consideration of the court. The case of Lodge v. Dicas rested upon a totally different ground from the present, for there the consideration for the discharge of the one defendant (Dicas) was the allowing the other partner to collect the partnership debts, and the court held that, as there was no evidence that that fact was known to the plaintiffs, there was no consideration whatever for the plaintiffs' promise; but the point which now arises was not taken by the counsel or acted upon by the court. This point, however, was much considered in Thompson v. Percival, and the decision there was wholly irrespective of the fact that a bill had been given. As I am, therefore, clearly of opinion that the sole responsibility of one of several joint debtors is different from their joint responsibility, the plea discloses a sufficient consideration for the plaintiff's promise to exonerate this defendant from the residue of the debt, and affords a good answer to the action.

Rule refused.

MOTLEY v. WICKOFF.

(Supreme Court of Michigan, 1897. 113 Mich. 231, 71 N. W. 520.)

MONTGOMERY, J. This case was determined by the circuit court upon an agreed state of facts. The defendant and one Gill, as copartners, became indebted to the plaintiff in the sum of about $140. In April, 1891, Wickoff retired from the firm of Wickoff & Gill, and Gill, in consideration of the partnership property all being turned over to him, assumed the payment of all the partnership debts. After the dissolution of the firm, and before this action was brought, the amount had been reduced from $140 to $116, by payments to plaintiff made by Gill. It further appears that Gill, shortly after the dissolution, stated to plaintiff that he had assumed, and agreed with Wickoff to pay, all the partnership indebtedness, and that to said statement plaintiff replied, "All right; pay as fast as you can;" that, some time after the dissolution, defendant saw the plaintiff, and stated to him that, according to the terms of the dissolution between himself and Gill, Gill was to pay the sum due and owing to the plaintiff, and asked plaintiff if he would release him (defendant) from the indebtedness, to which plaintiff replied that he would. Upon this state of facts, the case was submitted to the court, upon a stipulation that the plaintiff was entitled to recover if the court should find that the defendant has

not been released from the indebtedness. The court found, as matter of law, that there was no consideration for the promise of the plaintiff to defendant to release him from his liability on the partnership indebtedness, and entered judgment for the amount claimed with costs. * * *

The case must turn upon the question of whether there was a consideration to support the promise to look to Gill alone. The authorities are not agreed upon the question of whether the agreement of one joint debtor or copartner to pay the debt upon which the two are liable is a sufficient consideration to support a release of his codebtor. The modern English doctrine appears to be that such an undertaking is a sufficient consideration, on the ground that the sole liability of one of two debtors may, under many circumstances, be more beneficial and convenient than the joint liability of two, and that whether it was actually a benefit in each particular case will not be inquired into, but that the changed relation will be held to be a sufficient consideration. See Thompson v. Percival, 5 Barn. & Adol. 925, and Lyth v. Ault, 7 Welsb., H. & G. 669. This doctrine has also found support in this country, to the extent stated in Collyer v. Moulton, 9 R. I. 90, 98 Am. Dec. 370, in which it was said: "If, by a mutual arrangement between the plaintiff Collyer and the two defendants, Moulton had been released from his liability for the work already done, and a new promise made by Bromley, the other defendant, to pay for it, this would have been a release for a valuable consideration; one debt would have been substituted for the other." See, also, Bantz v. Basnett, 12 W. Va. 772; Bowyer v. Knapp, 15 W. Va. 277; Waydell v. Luer, 3 Denio (N. Y.) 410. Contra, Early v. Burt, 68 Iowa, 716, 28 N. W. 35; Wild v. Dean, 3 Allen (Mass.) 579. In the case of Johnson v. Emerick, 70 Mich. 215, 38 N. W. 223, Mr. Justice Champlin, speaking for the court, said: "Such discharge from liability is based upon the express or implied assent of the creditor, upon a sufficient consideration; and a creditor, knowing of such relation, who goes on and deals with the other partners with reference to the debt, may well be held to have assented to the arrangement, and to have accepted the responsibility and promise of the partner assuming to pay such debt. This consideration need not be a money consideration. It may be the obtaining of an additional security, better terms of payment, negotiable securities which the creditor may use in his business, or any other benefit, or it may be the loss of some right or disadvantage suffered by the surety through the act of the creditor." In the present case it will be noted that the transfer of the firm property by defendant to Gill was not induced by any promise of plaintiff, but had occurred before any promise of release was made; nor does it appear, as before stated, that the defendant lost any rights; nor was any security taken or accepted by the plaintiff; nor does it appear that the time for the payment of the debt was extended. Plaintiff relies upon Walstrom v. Hopkins, 103 Pa. 118, and Eagle Mfg. Co. v. Jennings, 29 Kan. 657, 44 Am. Rep.

668. In the latter case it was claimed that the plaintiff had due notice of the dissolution of the firm, and the assumption of the liabilities by Whitney, and that they accepted him for the payment of the bill of exchange. The court said: "The dissolution of the partnership, the taking of all the partnership property, and the assumption of all partnership liabilities by Whitney, in no manner released defendant. The alleged promise of plaintiff was made after the dissolution, and not as an inducement to or consideration of it. The acceptance has never been paid. * * * No additional security of any kind was furnished. The acceptance was not destroyed, and new paper given. The plaintiff received absolutely no consideration, and, even if it did promise that it would look to Whitney, such promise was entirely without consideration, and in no manner discharged the defendant." In Walstrom v. Hopkins it was held that a promise by a creditor of a firm to release a partner who had retired from the firm, and to look to the continuing partner only, for the payment of his debt, unless founded upon a legal consideration, is nudum pactum, and cannot be enforced. The weight of authority favors the contention that the promise of the continuing partner may be a sufficient consideration to support the release of the outgoing partner. But, in the absence of such concurring or binding promise, we think no well-considered case can be found, holding that the mere agreement between the partners will of itself support the agreement of the creditor to release the outgoing partner. Such an agreement does not establish a privity between the continuing partner and the creditor, entitling him to sue such creditor individually. It is only a private executory contract, intended to regulate the rights, duties, and obligations of the co-partners between themselves, consequent upon a dissolution of the firm. Wild v. Dean, 3 Allen (Mass.) 579. In the present case there was not only no extension of time, no acceptance of the paper of the individual partner, but the stipulation does not show an express agreement made to plaintiff by Gill to pay the debt. The finding is that Gill stated to plaintiff that he had agreed with Wickoff to pay all partnership indebtedness, and that to this the plaintiff replied, "All right; pay as fast as you can." It will be noted that this was not simultaneous with the release of Wickoff, nor did it in terms establish a privity between Gill and plaintiff as to the obligation of Gill to pay the debt individually. We think the judgment should be affirmed.

STONE J., IN HALL & LONG v. JONES.

(Supreme Court of Alabama, 1876. 56 Ala. 493.)

[In discussing whether there was an agreement releasing the retiring partner:] When goods were consigned by Hall & Long to Hannon, Brown & Jones, and received by them as commission merchants

this constituted a contract, binding on each of the partners composing the latter firm, to account for the goods or their proceeds. Such liability could not be canceled by any act of the latter firm alone, or by any agreement its different members might make among themselves, in which Hall & Long did not concur. It requires the same mutuality to vary or modify a contract as it does to create it in the first instance, for modification is only a species of contract. The mutual agreement of the parties, a promise for a promise, is sufficient to uphold such modified contract, without other new consideration. Thomason v. Dill, 30 Ala. 455, 456, and authorities cited.

Failure to demand payment of Mr. Jones, unless for a sufficient length of time to create a bar by limitation, did not, per se, cancel his liability. Neither would the demand of payment from the succeeding firm, or even the receipt of interest on part payment, or all these combined, necessarily lead to such result. The true inquiry is, was there an agreement to discharge the older partnership, and to substitute the new one as the debtor? Unless this be shown, the liability of the older firm remains.

Speaking on this question, Mr. Parsons, in his work on Partnership (page 425), says: "Frequently the new firm goes on in its regular business, the accounts of the customers are transferred from the old to the new, and the customers, knowing the retirement and change of parties and transfer of accounts, say nothing, but continue their dealings with the new firm, perhaps depositing and drawing, or buying and selling, or receiving interest and settling accounts, all just as before, taking no particular notice of the change. The question then occurs, what is the legal significance and effect of such conduct? And it seems to be well settled that the mere receiving of interest from the new firm will not discharge the old; and although the transferring the old account to the new firm is not necessarily an adoption by the creditor of the new firm as his sole debtors, yet this fact, together with the other circumstances of the case, may be evidence from which a jury would be authorized to find that the creditor had impliedly assented to a discharge of the old firm." He adds "that, when the liability at a given time of all the partners is proved, the burden is on those of them who seek to escape continued liability, to show a cessation." * * *

It is not necessary, nor do we feel inclined, to adopt some of the extreme views advanced above. Still we hold that, to discharge a retiring partner from a liability once incurred, the facts and circumstances must satisfy the jury that the plaintiff agreed to release the old and look to the new firm. Proof, if made, that the accounts against the old firm were restated against the new, would be strong evidence from which an agreement might be inferred; but it is not for us to declare what will be sufficient evidence to satisfy the minds of the jurors. We agree with Baron Garrow that, whenever there is any

evidence from which such agreement could be inferred, then the question of agreement vel non should be submitted to the jury in a charge appropriate to the testimony in the cause. * * *

III. Dissolution.

LYON et al. v. JOHNSON et al.

(Supreme Court of Errors of Connecticut, 1859. 28 Conn. 1.)

Assumpsit for coal sold to the defendants as partners. It was claimed in defense that the partnership between the defendants had been previously dissolved and sufficient notice of the dissolution given. The defendants, Johnson and Signor, previous to the 9th day of March, 1857, had been in partnership in the town of Danbury under the name of R. Johnson & Co., and as such partners had in the fall of 1856 purchased coal of the plaintiffs, who also did business in Danbury as partners under the name of Lyon & Burr. On the 9th day of March, 1857, the firm was dissolved, and the business was thereafter carried on by Signor alone. Notice of the dissolution was published for three successive weeks in the Danbury Times, a weekly paper published in Danbury; but no other notice was given to the plaintiffs. In the fall of 1857 Signor bought a quantity of coal of the plaintiffs, which they sold and delivered upon the credit of the firm of R. Johnson & Co., and in the belief that he bought it for that firm. The advertisement of the dissolution of the partnership of the defendants was inserted in the newspaper next after an advertisement of the plaintiffs; but the plaintiffs did not take the paper, and had not seen the notice of the dissolution, and had no knowledge that the partnership was dissolved. The sale of coal by the plaintiffs to the defendants in 1856 was the only previous dealing of the firm of Lyon & Burr with the defendants; but for some years before the defendants had bought coal of the firm of Lyon & Bates, a firm of which the plaintiff Lyon was a member, and which was dissolved in the summer of 1856; Bates retiring from the business, and Lyon forming a new partnership with Burr, who had been a clerk of Lyon & Bates, and the new firm taking and continuing the business of the former firm.

The case was tried in the superior court on an issue closed to the court. The court specially found the above facts and rendered judgment thereon for the plaintiffs. The defendants thereupon filed a motion in error and brought the record before this court for revision.

Butler, J. There is no error in the judgment of the court below, and this will be apparent from a brief statement of the principles applicable to the case.

By the constitution of a general partnership, and as one of the elements of it, each partner is vested by his copartners with power to

contract for and bind the firm within the scope of the partnership business. Each is constituted the agent of all, and each is responsible for the acts of all.

Once existing, and publicly known to exist, the continuance of the connection will be presumed by the public till the contrary appears. If a dissolution takes place by operation of law, as by death or bankruptcy, no notice is required. The operations of law have a notoriety which all are bound to regard. But a dissolution by limitation, or the voluntary and mutual assent of the partners, is a matter of private arrangement, which cannot be presumed to be known to others unless they are informed of it. Until such information is given, actually or constructively, therefore, the continuance of the connection, and of the powers and liabilities of each partner, may well be presumed by every one who has occasion to deal with either on account of the firm. It follows upon the principles of justice and policy, and in conformity with the perfectly well settled rule of law, that upon such a dissolution of the partnership a retiring partner, who wishes to do justice to others and terminate his own responsibility, is under the obligation to give information of the fact to all who have dealt or are dealing with the firm, and to the public at large, with whom new attempts to deal may be made. It is equally clear that the notice so given by a retiring partner should be coextensive with the obligation assumed and as particular and specific as can be reasonably required of him under the circumstances of the case. He knows or may know who the persons are who have dealt with the firm, and he can, without unreasonable effort, give each of them actual notice, and therefore the law requires that he should do so. He cannot, without more effort or expense than can reasonably be demanded of him, give actual notice to every other member of the public, and therefore the law does not require it; but it does require him to discharge his obligation if he would terminate his liability, and to give some, and reasonable, notice to the public at large. Ordinarily a publication in one of the newspapers published in the place or county where the partnership business was conducted, as it is the customary mode of giving such information, will, as to all who have not had previous dealings with the firm, be deemed sufficient. That is the least that can be required of him in an ordinary case in respect to the public, and even that may not in all cases be sufficient, and whether it be or not will depend on the circumstances of the particular case. But in relaxing the rule as applicable to those who have not dealt with the firm, and considering a general notice, operating as a constructive notice, to be sufficient as to them, because of the difficulty of giving actual notice to everybody, the courts have not intended to relax, and have not relaxed, the rule in respect to those who have dealt with the firm. As to them there is no reason for such relaxation, and a publication is never sufficient, unless, indeed, it can be shown that the publication was seen by them, and therefore that they in fact had actual knowledge.

In this case the dissolution of the firm of R. Johnson & Co. was voluntary, and not by operation of law. The plaintiffs had previously dealt with the firm, and upon the facts found they may well be considered as regular dealers. No actual notice of the dissolution was given them, and it is found that they had no actual knowledge of it.

The publication, unless it came to their knowledge, was not as to them sufficient. The character of their previous dealing and the circumstances attending the publication of the notice, including the contiguity of the advertisements, were proper matters of evidence to be taken into consideration by the court in the question whether the plaintiffs actually knew of the dissolution or not. Doubtless the court considered them. But having found that no actual notice was given to the plaintiffs, and that they did not see the publication, and had no actual knowledge of the dissolution, and that there had been previous dealing between the parties, the court correctly rendered judgment for the plaintiffs.

The judgment of the superior court is therefore affirmed.

Judgment affirmed.

AUSTIN v. HOLLAND.

(Court of Appeals of New York, 1877. 69 N. Y. 571, 25 Am. Dec. 246.)

This action was on a promissory note made in the firm name of Dillon, Beebe & Co., payable to Horace Loveland. Defendant Holland alone appeared and answered. He admitted the making of the note, and that the plaintiff was the holder, but denied that he was a member of the firm. Defendants were copartners under the above firm name prior to the giving of the note. Judgment for the plaintiff on the verdict was affirmed at the General Term of the Supreme Court, and defendant appealed.

ANDREWS, J. The plaintiff was a dealer with the firm of Dillon, Beebe & Co., so as to entitle him to the protection of the rule which makes a retiring partner liable for subsequent engagements made by his former copartner in the firm name with those who had previous dealings with the firm, and who entered into the new transaction without notice of the change in the partnership. * * *

The principal question in this case is whether Loveland had notice of the dissolution of the firm of Dillon, Beebe & Co., which occurred March 29, 1869, prior to August 31, 1869, when the note upon which the action was brought was made. The firm was engaged in the business of the purchase, shipment, and sale of lumber, and its principal office was at Toledo, in the state of Ohio. The plaintiff was employed to purchase lumber in the Western States and in Canada, and resided at Detroit. Notice of dissolution was published in the newspapers at Toledo, and a copy was mailed to the plaintiff, addressed to him at Detroit.

Loveland, on his direct examination, testified positively that he never received the notice. On his cross-examination he stated that he had no recollection of receiving or seeing the notice, and that, if he had seen it, he thought he should have remembered it. The judge submitted it to the jury to find whether the plaintiff received the notice. The defendants' counsel excepted to the submission of the question to the jury, on the ground that the jury would not be justified in finding from the evidence that the plaintiff did not receive the notice, and upon the further ground that it was immaterial whether he received it or not; that the mailing of the notice was all that the defendant was required to do to protect him from liability for the subsequent services of the plaintiff.

The publication of notice of the dissolution of a partnership in a newspaper at the place where the business was carried on is notice to all persons who have not had prior dealings with the firm; and, if thereafter one of the partners enters into a contract in the firm name with a new customer or dealer, the other partners will not be bound. The rule is different in respect to persons who have dealt with the firm before the dissolution. The rule in such cases in this state requires that, to relieve a retiring partner from subsequent transactions in the partnership name, notice of the dissolution must be brought home to the person giving credit to the partnership. If in any way, by actual notice served, or by seeing the publication of the dissolution, or by information derived from third persons, the party, at the time of the dealing, is made aware of the fact that the partnership has been dissolved, the contract will not bind the firm. It is sufficient to exempt the firm from liability that the person so contracting with a partner in the firm name knew or had reason to believe that the partnership had been dissolved; but this must appear and be found by the jury, or else the contract will be treated as the contract of the partnership. Ketchum v. Clark, 6 Johns. 144, 5 Am. Dec. 197; Graves v. Merry, 6 Cow. 701, 16 Am. Dec. 471; Vernon v. Manhattan Co., 17 Wend. 524; Id., 22 Wend. 183; National Bank v. Norton, 1 Hill, 572; Coddington v. Hunt, 6 Hill, 595; Clapp v. Rogers, 12 N. Y. 287; City Bank v. McChesney, 20 N. Y. 242; Bank of Commonwealth v. Mudgett, 44 N. Y. 514; Van Eps v. Dillaye, 6 Barb. 244; Mechanics' Bank v. Livingston, 33 Barb. 458. In Vernon v. Manhattan Co., the Chancellor says: "But, to exempt the copartners from liability (on a contract with a previous dealer with the firm), the jury must be satisfied that the person with whom the new debt was contracted either had actual notice that the copartnership was dissolved, or that facts had actually come to his knowledge sufficient to create a belief that such was the fact." The same rule is recognized in the other cases cited, and by elementary writers. 3 Kent's Com. 607; Story on Part. § 161; Coll. on Part. § 533; Lindley on Part. 337. Lindley says: "Those who have dealt with the firm before a change took place are entitled to assume, until they have notice to the contrary, that no change has occurred. * * *

If notice in point of fact can be established, it matters not by what means; for it has never been held that any particular formality must be observed." In this case the jury have found that the plaintiff did not receive the notice sent by mail, and had no information of the dissolution of the firm of Dillon, Beebe & Co. prior to the transaction in question. The mailing of notice properly directed to the party to be charged raises a presumption of notice in fact; for it is presumed that letters sent by post to a party at his residence are received by him in due course. Best on Presumptions, § 403. But this is a presumption of fact, and not of law, and may be repelled by proof; and if the receipt of the letter in this case was disproved, then the defendant failed to show the actual notice required in order to exempt him from responsibility, and the question whether the letter was received was, we think, upon the evidence for the jury. The learned counsel for the defendant has not referred us to any case which decides that the mailing of a notice of dissolution is in law equivalent to actual notice and exempts a retiring partner from liability to prior dealers on subsequent engagements in the firm name. Notice by mail of the dishonor of commercial paper is in most cases sufficient by the law merchant to charge an indorser. It is a part of the contract that notice may be given in this way, and it is not material in fixing the liability of the indorser whether he receives it or not.

But we think the rule requiring actual notice of the dissolution of a partnership to prior dealers is a part of the law of this state and should not be departed from. It may subject parties in some cases to inconvenience, but the principle upon which the rule proceeds is that, when one of two parties is to sustain injury from the giving of credit, the one who originally induced it should bear the loss, rather than the one who, without notice of the change, relied upon the continued existence of the partnership. Story on Part. § 160; Wat. on Part. 384.

The judgment of the General Term should be affirmed.

Judgment affirmed.[1]

[1] "It is often difficult to determine what amounts to due and sufficient notice of the retirement of a partner, but the evidence to prove it should be such as would reasonably warrant the jury in finding the fact of notice, and that the party to be charged with it actually had it, or might by reasonable diligence have learned of the dissolution of the partnership and the retirement of the partner sought to be charged, from the means and opportunity supplied or afforded for the purpose of giving notice of the same. Generally the reasonableness of the notice will be a mixed question of law and fact, to be submitted to the jury under proper instructions of the court as to whether, under all the attending circumstances of the particular case, it was sufficient to warrant the inference of actual or constructive knowledge of the dissolution. As said above, ordinarily, notice fairly given in a newspaper generally circulated abroad, and particularly among the business people of the town or city where the partnership carried on its business, would be sufficient as to all persons who had not had previous dealings with the partnership. It is ordinarily better and safer to give notice in that way, although it might be given in other ways. This would afford business men reasonable opportunity to learn of the dissolution, and in the course of business the

ROSE et al. v. COFFIELD.

(Court of Appeals of Maryland, 1879. 53 Md. 13, 36 Am. Rep. 389.)

MILLER, J. This suit was brought by the appellee against the appellants, Rose and Porter, as partners composing the firm of J. B. Rose & Co., upon a check of which the plaintiff was the indorsee and holder. This check was upon the Citizens' National Bank for $130, was dated the 29th of November, 1871, and was payable on the 2d of December following. It was drawn by Eastman & Rogers, to the order of J. B. Rose & Co., and bears the indorsement of the payees and also of two other firms. The proof shows that this check was given in renewal of a promissory note for the same amount, dated the 27th of October, 1871, payable one month after date, drawn and indorsed by the same firms, and also indorsed by another firm. The plaintiff received this note on the day of its date from Rose in good faith, and paid him therefor $430 in cash. He also received the check, in renewal of the note, on the day of its date, from Rose, who then indorsed the name of J. B. Rose & Co. thereon. At the date of the note, and for some years prior thereto, Rose and Porter had been partners, conducting the printing business under this firm name; Rose being the active business manager of the firm. On the 16th of November, 1871, after the date of the note, but before the check was given, the firm was dissolved, and notice of the dissolution published in the newspapers of Baltimore city for several days. But there is no proof that the plaintiff took or read either of the papers in which this publication was made, and there is, therefore, nothing in the case bringing home to him actual notice of the dissolution, or affecting him with notice thereof. Boyd v. McCann, 10 Md. 118. In this state of the case the question arises whether Porter is liable upon this check; the firm having been in fact dissolved before Rose indorsed the firm's name thereon. * * *

It has been argued with much force that the plaintiff had but a single transaction with this firm before its dissolution, which consisted simply of the purchase by him of the note of the 27th of October, and that this did not amount to such dealing with the firm as to entitle him to actual notice. So far as our researches have extended, the cases in which this question has been considered are not numerous, and those in which the decisions have necessarily turned upon it are very few. It is certain that no inflexible rule or standard of

matter would be generally known, and more or less spoken of, to business men from every direction. But such publication must be fair and reasonable as to its terms and the number of times it shall be made. If the facts are found or ascertained, the reasonableness and sufficiency of the notice may be a question of law for the court. The court must determine that there is or is not evidence sufficient to go to the jury to prove notice." Per Merrimon, C. J., in Ellison et al. v. Sexton et al., 105 N. C. 356, 11 S. C. 180, 18 Am. St. Rep. 907 (1890).

dealing, by which all cases can be governed or measured, has been established.

[After reviewing numerous authorities:] The principle, as shown by these authorities, upon which this rule of actual notice is founded, seems to embrace the present case. That principle is that credit already raised on the faith of the partnership is presumed to be continued on the same footing, unless special notice of a change be given; and as every partner knows, or has the means of knowing, who are the persons with whom his firm has transacted business and from whom it has received credit, public policy and natural justice alike demand that he should give every such party personal and special notice of the withdrawal of his responsibility. As was said by the Chancellor, in Vernon v. Manhattan Co., 22 Wend. (N. Y.) 183, the word "dealing," when used in reference to this rule, "is merely used as a general term to convey the idea that the person who is entitled to actual notice of the dissolution must be one who has had business relations with the firm, by which a credit is raised upon the faith of the copartnership." It may be true, as was most forcibly stated by Senator Verplanck in the same case, that one who merely takes the negotiable paper of a firm from a third hand, and received payment through a bank, or passes it away to another, cannot be called a dealer with the firm; and it may well be said that it would be to require impossibilities to insist that the partners of a large commercial house in extensive business should be able to know for years who had been the last holder of their paper, or through whose hands it may have passed, and to send to all of them special notice as dealers. But the case now before us is not of that character, and no such difficulty arises. The plaintiff received the note of October, 1871, with all the subsequent indorsements then upon it, directly from Rose, one of the partners of this firm, then subsisting, and paid him for it its full face value, thus bringing the plaintiff and the firm into a mutual dealing. It cannot be doubted but that by this transaction a credit was raised upon the faith of the partnership, and that the plaintiff gave them credit and relied upon the united responsibility of the two partners. Porter, the other ostensible and known partner, knew, or had the means of knowing, through whom the money upon this note was raised. The plaintiff dealt in this transaction immediately and directly with the firm, and did not receive the note from a third party and merely pass it away to another. Nor is there any proof to show that this firm was a great commercial house, engaged in extensive trade, and constantly issuing their negotiable securities, so as to make it difficult for them to know through whose hands their paper may have passed. We are therefore of opinion this case must be governed by the general rule, and that actual notice of the dissolution should have been given to the plaintiff in order to relieve the defendant, Porter, from responsibility on this check.

Judgment affirmed, with costs.

GROSVENOR v. LLOYD.

(Supreme Judicial Court of Massachusetts, 1840. 1 Metc. 19.)

Assumpsit for the use and occupation of a stable from April 1 to May 2, 1835. At the trial in the court of common pleas, before Ward, C. J., the evidence, so far as it bears upon the point hereinafter decided, was this: The plaintiff, in November, 1831, demised said stable (whether orally or in writing did not appear) to I. Stone, who, with D. Stone and L. Doolittle, his partners in the business of keeping a livery stable, took possession thereof, and there carried on their said business. The sign over the door was "I. Stone & Co.," and it remained unaltered until May 2, 1835. On the 1st of April, 1833, Doolittle withdrew from the partnership, and sold his right and interest therein to the defendant, who was then admitted as a partner with I. and D. Stone. The defendant gave evidence that this last partnership was dissolved on the 1st of April, 1835, and the plaintiff gave evidence of the defendant's acknowledgment that he continued to be a partner after that day. I. Stone occupied the stable from that day until the 2d of May following, when he quitted it; and he was the only active partner from November, 1831, to said 2d of May.

The judge instructed the jury "that the rent of the stable, in which the partnership business was carried on, was a fair charge against all the partners, and, even if the defendant was a secret partner, he was liable with the other partners for the rent; that the defendant was a partner on the 1st of April, and had so been long before; and that if I. Stone, with the same sign over the door, and ostensibly in the same manner, occupied the stable after April 1, 1835, as he had done before, the plaintiff had a right to charge all the partners for the rent until he had notice of the dissolution of the partnership."

The verdict was for the plaintiff, and the defendant excepted to these instructions.

SHAW, C. J. The court are of opinion that this direction was not correct. A dormant partner is liable for debts contracted whilst he is a partner, not because credit is given to him, but because he is in fact a contracting party, taking part of the profits of such contracts. But, when he ceases to be in fact a partner, the reason ceases, and he is no longer liable. He is not liable as a contracting party, because the partnership name, under which the remaining partners continue to transact business, no longer includes him, though that name may remain the same; and he is not liable as holding out a false credit for the firm, because the case supposes that he is not known as a partner, and therefore the firm derives no credit whilst he remains a secret or dormant partner. No customer, therefore, or other person dealing with the firm, can be disappointed in any just expectations if he silently withdraws from the firm. A very different rule would apply where

one had been a known or ostensible partner and held himself out as such.

Exceptions allowed, and the verdict to be set aside, and a new trial had at the bar of the court of common pleas.

ELMIRA IRON & STEEL ROLLING MILL CO. v. HARRIS et al.

(Court of Appeals of New York, 1891. 124 N. Y. 280, 26 N. E. 541.)

Appeal from a judgment of the General Term of the Supreme Court, Fourth Department, entered on an order affirming a judgment in favor of the defendant Harris, entered upon the verdict of a jury at circuit. The action is brought to recover upon liabilities of the firm of Blood & Co., originally composed of the defendants. The defendant Harris alone defends and upon the ground that several years prior to the transactions upon which this action is founded he had withdrawn from the firm. It appears that the plaintiff had had dealings with Blood & Co. prior to Harris' withdrawal and that notice of such withdrawal was not given to the plaintiff. But the defendant insists that he was a dormant partner, and therefore not bound to give notice of his retirement from the firm to those with whom the firm had dealt prior thereto, in order to relieve himself from liability for an indebtedness subsequently incurred by those who continued to carry on the business under the same firm name. * * *

PARKER, J. The question to be determined is presented by an exception taken to the refusal of the court to direct a verdict in favor of the plaintiff. The plaintiff insisted that it was the duty of the court to determine, as a matter of law, that the defendant, while a member of the firm of Blood & Co., was an ostensible partner. The trial court held otherwise, and submitted to the jury the question whether Harris was an ostensible or dormant partner, with the further instruction that, if they should find that he was a dormant partner, then the defendant was entitled to a verdict. Now, it is the general rule that a partner can only relieve himself from liability for subsequent transactions had with his former partners in the partnership name by giving notice of his withdrawal. Austin v. Holland, 69 N. Y. 571, 25 Am. Rep. 246; Howell v. Adams, 68 N. Y. 314; Elkinton v. Booth, 143 Mass. 479, 10 N. E. 460. The rule is founded upon the principle governing the liability of a principal for the acts of his agent. Where an agent has once represented his principal, if the principal would avoid responsibility for his acts in the direction of his original authority after the agency has ceased, it is incumbent upon him to notify those with whom he has dealt that such relation no longer continues. And a partner, in dealing with third parties in behalf of the partnership, not only acts for himself, but as agent for each of the

other members of the firm. So that, when a partner withdraws from a firm, it is his duty to give notice of that fact, in order that it may be understood that his former partners have no longer any right to represent him; and, if he fail to discharge that obligation, he cannot thereafter avoid liability for an indebtedness incurred in the partnership named to a party unaware of the changed situation. It appears that a notice of dissolution was, at the time, published in a local paper, but that could only affect those who should deal with the firm for the first time after the withdrawal. It did not operate as a notice to the plaintiff, with whom the firm had had business relations prior thereto. As to it, actual notice could alone suffice. It was not given, and therefore defendant is chargeable with the indebtedness sought to be recovered, unless he is entitled to the protection of the one exception to the rule, continuing the liability of partners after dissolution who fail to give noice. A dormant partner need not give notice, and the jury have been permitted to find that such was Harris' relation to the firm of Blood & Co. Whether rightly, we must now consider. The first step in that direction is to ascertain what is meant by the term "dormant partner." Bouvier defines "dormant" as "sleeping; silent; not known; not acting." "A dormant partner," says Collyer in his work on Partnership (6th Ed., p. 11), "is he whose name and transactions as a partner are professedly concealed from the world; * * * is one who shares in the profits of a business, but is not known as a member of the firm." A dormant partner is one "taking no part in the management of the partnership." Lindl. Partn. 16. "We think, however, the word implies both the quality of secrecy and inactivity." T. Pars. Partn. 33. In National Bank v. Thomas, 47 N. Y. 15, 19, the court said: "A dormant partner is one who takes no part in the business, and whose connection with the business is unknown. Both secrecy and inactivity are implied by the word." As the court cited North v. Bloss, 30 N. Y. 374, as well as other authorities, in support of the definition given, it is clear that it did not understand or intend that the North Case should have the effect of altering a rule which had been long settled as asserted by it. It follows that one occupying such a relation to a partnership need not give notice, because, his connection with the firm not having been known, it cannot have contributed in any degree towards establishing the credit of the firm, and, consequently, his withdrawal could not take away a single element which helped to build up the business reputation and credit of the partnership. Such we deem the rule, and it should not be extended. Credit is a matter of such importance in the mercantile world, and the financial standing of any partner may, through various sources, be so readily commingled with that of his firm, that it is essential that he should be required to take the precaution of giving notice of withdrawal, unless it clearly appears that his connection with the firm did not add to its reputation for responsibility.

It is not attempted here to establish a partnership liability against

Harris on the ground of estoppel, which would have burdened the plaintiff with the necessity of establishing that he held himself, or knowingly permitted another to hold him, out as a partner; that the plaintiff had knowledge of such holding out and was induced thereby the create the debt; and the authorities applicable to such a situation, of which Thompson v. Bank, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507, is a type, need not be considered. The written agreement entered into between the Bloods and Harris made the parties actual partners. It neither limited the liabilities nor the agency of either. It did not suggest that Harris' connection with the firm should be kept secret. It did not provide that Harris should, as to its business, be wholly inactive. It required each of the Bloods to give his entire time and attention to the business, for which each was to be paid $600 per annum; while as to Harris, who was engaged in other business, it was agreed that he should "be consulted in the business, and all plans and operations of the firm shall be made and done with the advice of the firm, and the said N. C. Harris is to have and receive from the firm $100 per year for his services, for the care and assistance which he may render to the firm without giving his personal attention to the business." The agreement, therefore, does not indicate that it was the intention of the parties that Harris should be a secret partner, sharing in the profits as a reward for his contribution to the capital, without contributing in any other manner to the standing and business of the firm. Neither was he, in fact, inactive during the seven years that elapsed before his withdrawal. While he did not engage in the purchase of material or the sale of manufactured articles, he did take part to some extent in the financial management of the partnership, and in the settlement of controversies, in which he wrote letters over his own signature as well as that of the firm. During some portions of the partnership period he was frequently about the shops, at times nearly every day, looking over the work, and occasionally speaking to the different foremen about it. Neither did his partners keep secret the fact of his connection with the firm. * * *

Again, the adoption of the firm name of Blood & Co. is in the opposition to the claim of dormancy on the part of Harris. A dormant partner is one who becomes such by a secret arrangement, while his associates are held out to the world as sole proprietors and managers of the business. Beecher v. Bush, 45 Mich. 188–203, 7 N. W. 785, 40 Am. Rep. 465. If the business had been carried on under the firm name of Blood & Blood or Blood Bros., then the Bloods would have been held out as comprising the entire firm. But the words "& Co." indicate an agency, and that a principal or principals are undisclosed, and, if credit is given, the law presumes that it was given to all the principals. In Shamburg v. Ruggles, 83 Pa. 148, the court say: "If A., B., and C. enter into articles of association, and agree that the business shall be conducted by A., and in his name alone, B. and C. in such case are dormant partners, and, though liable for the debts and obliga-

[illegible] of the firm during its continuance, are not so liable for debts after its dissolution, although notice of such dissolution may not have been given to the public or those previously dealing with it, for it is to be presumed that credit was given upon the responsibility of A. alone, and not upon that of B. and C. If, however, the business be conducted in the name of A. & Co., a different presumption arises, for then it is supposed that credit is given, not to A. alone, but to all those composing the company; in other words, to the firm, and not to any one individual of it. In such case, if B. and C. retire, notice must be given to those dealing with the firm, or he will continue to be liable for the debts thereof subsequently contracted with former creditors, who may be ignorant of the dissolution." To the same effect is the reasoning of the court in De Ford v. Reynolds, 36 Pa. 325; Podrasnik v. Martin, 25 Ill. App. 300; Deering v. Flanders, 49 N. H. 225; Clark v. Fletcher, 96 Pa. 416.

Notwithstanding the terms of the agreement of partnership, the adoption of a firm name which did not exclude the defendant, the announcement, by each of the Bloods to those making inquiries and having dealings with the firm, that Harris was one of the partners, and the further fact that he, to some extent, participated in the settlement of accounts and the financial management of the business—facts which, standing alone, determine that Harris' status in the firm was that of an ostensible partner—it is insisted that other evidence, presented on the part of the defendant, authorized a submission to the jury of the question whether he was a dormant partner. The evidence relied on in support of such position was (1) that it was said at the time of the formation of the partnership that it should not be made public—"should not be talked about at all"; (2) the testimony of a number of witnesses residing in that locality, some of whom had had dealings with the firm of Blood & Co., to the effect that they did not know that Harris was a partner. This evidence, it is asserted, tended to show that his relation to the firm of Blood & Co. was not generally known. It may be observed, in passing, that one of the Bloods denied that there was any understanding, at the time of the formation of the partnership, that the fact of Harris' membership should not be talked about, and evidence was adduced on the part of the plaintiff for the purpose of showing that it was quite generally known in the community that Harris was a member of the firm.

For the purposes of this review, however, the plaintiff's answering evidence cannot be considered, as we are to determine whether the defendant's evidence was of such a character as to authorize a jury to find that he was a dormant partner, notwithstanding the facts which, if standing alone, we have asserted require a holding that he was in law an ostensible partner. The agreement of partnership was reduced to writing. It does not in any manner suggest that the membership of Harris was to be kept from the public It purports to embrace the entire agreement, and the defendant has not attempted to show that,

in reducing the agreement of the parties to writing, anything was omitted by mistake or otherwise which had been agreed upon. It is not asserted that this so-called understanding was made a part of the original contract. It is not pretended that the parties made a subsequent agreement founded upon a new consideration. It does not clearly appear that the matter was spoken of in the presence of all the parties, much less assented to; for Samuel N. Blood says he does not remember any such thing, and was not a party to any such agreement, and Harris' evidence does not necessarily include him. Harris' testimony on that subject, and the whole of it, is comprised in an answer to a single question: "Question. Now you may tell me, at the time you entered into this partnership, was there anything said between you as to whether this should be made public? Answer. There was, sir; it was not to be talked about at all." It is, we think, clear that this evidence cannot be permitted to effect a change in the legal relation which the parties assumed in writing and by subsequent conduct. Neither can a general partner, who, in order to relieve himself from a liability which attaches to an ostensible partner, assumes the burden of proving that he was a dormant partner, be deemed to have so well borne it as to destroy the legal effect of acts of the character disclosed by this record, by the testimony of his neighbors and others, given years after the dissolution, to the effect that they did not know until after the happening of that event that he was ever a member of the firm, supplemented by the expression of his own opinion that not one in ten in his vicinity knew of it. The question is not whether one knew it, or nearly all, but whether by agreement, the adoption of a firm name, and subsequent conduct he so held out the Bloods as the only members of the partnership as to prevent his name from contributing to the standing and credit of the firm. If he did not, then he must be visited with the legal consequences of his failure to give notice to those who had, prior to his withdrawal, transacted business with the firm, and the lack of information on the part of some or many persons will not operate to shield him from it. The plaintiff, it seems, did not know that Harris was a member of the firm, but that fact cannot avail the defendant, because, at the time of the commencement of the dealings with the plaintiff, he was "an ostensible, and not a secret, partner, and was such to all persons dealing with the firm, and his liability to the plaintiff is not changed by the fact that the plaintiff did not know that he was a partner. He trusted the copartnership, whoever the partners might be who composed it." Howell v. Adams, 68 N. Y. 314. This position is not only supported by authority, but is well founded in the methods largely adopted in business circles for the purpose of ascertaining whether credit shall be given. The competition in business and rapidity with which orders must be filled make it necessary for business houses to promptly ascertain whether credit shall be given. This necessity has contributed to the establishment of agencies which undertake to ascertain the financial condition of cor-

porations, firms, and individuals engaged in business. The inquiry addressed, naturally, is, what is the financial condition of Jones & Co.? For, having no acquaintance with the individuals comprising the firm, information as to membership does not aid the inquirer. So, in this case, the plaintiff's president testified that no inquiry was made as "to who constituted the firm of Blood & Co. * * * We thought the credit of Blood & Co., when we first commenced dealing with them, was good; we inquired, and ascertained that the credit of the firm was good." The judgment should be reversed.

HAIGHT, J. (dissenting). * * * The trial court held that, if Harris' connection with the firm was open and notorious as an ostensible partner, he would be liable; but if his position was not open and notorious as an ostensible partner, but was that of a dormant partner, he would not be liable; and this question was submitted to the jury, who found in favor of Harris, and the judgment entered upon this verdict has been affirmed by the general term. It has been repeatedly held in this court that questions involving the weight of evidence cannot be here reviewed; that they are finally disposed of by the general term; that this court can only inquire as to whether there is evidence upon which the verdict could stand. The claim is made that there is no such evidence. A "dormant partner" has been variously defined as "sleeping," "silent," "not known," "not acting"; one whose name and transactions as a partner are professedly concealed from the world; one who shares in the profits of a business, but is not known as a member of the firm. In its strictest sense, it may imply both the quality of secrecy and inactivity; but it has been held that to be such it is not essential that the dormant partner should wholly abstain from any actual participation in the business of the firm, or be universally unknown as bearing a connection with it. He may act in an advisory manner in the general business of the firm, and it is sufficient if he is not generally known as a partner. North v. Bloss, 30 N. Y. 374. With this understanding as to the meaning of the term "dormant," we proceed to inquire as to whether there is any evidence tending to show whether Harris was such, which required a submission of that question to the jury. Our attention is first called to the articles of copartnership. * * *

It consequently appears to me that, taking the evidence in connection with the articles of copartnership, a question was presented in which the jury might find that his position in the firm was that of an inactive partner. It still remains to be determined as to whether his connection with the firm was kept secret to such an extent as not to be generally known. * * * If a dormant partner, it is conceded he would not be liable by reason of the failure to give notice of the dissolution of the partnership, and the reason of the rule is that the plaintiff suffers nothing in consequence of such failure. If the plaintiff had no notice of Harris' connection with the firm at the time it transacted its business it could have given no credit on his account. This rule is salutary,

and is founded upon reason. The plaintiff has no right to exact a penalty from Harris by reason of his failure to give notice. The word "dormant," when used in this connection, should be held to cover cases that clearly come within the reason of the rule. The plaintiff, in order to recover, must show that it has suffered in consequence of his neglect. It is frankly admitted that the president or officers of the plaintiff did not know that Harris was a member of the firm at any time until after the final credit was given and the general assignment of Blood & Co., was made. It therefore gave no credit to the firm on account of Harris, and it suffered nothing by his failure to give a notice of his retirement, unless his relation with the firm was so notorious and ostensible as to give it a financial standing and reputation with the public. There is no pretense that his relation was of this character, or that any credit was given by the plaintiff because of any such reputation. * * *

I am therefore of the opinion that the judgment should be affirmed, with costs.

CHAPTER V.

THE POWERS OF PARTNERS.

SECTION 1.—ORIGIN AND NATURE OF THE PARTNER'S POWERS.

WINSHIP et al. v. BANK OF THE UNITED STATES.

(Supreme Court of the United States, 1831. 5 Pet. 552, 8 L. Ed. 216.)

Action against John Winship, Amos Binney, and John Binney, copartners trading under the name of John Winship, on several promissory notes, signed by John Winship as indorser. The partnership articles and a bond given by said Winship to the Binneys (construed as a part of the partnership agreement) provided for a partnership between the Binneys and Winship for the manufacture of soap and candles, and, in addition to prescribing the rights and duties of the respective parties, expressly provided that the "said John Winship shall * * * wholly abstain from becoming the surety or indorser of any person." At the trial numerous exceptions were taken to instructions given to the jury. Only that part of the opinion dealing with the exception to the third instruction is given here.

A verdict was found for the plaintiffs, and judgment entered thereon, which was brought up for review by writ of error.

Marshall, C. J. * * * The third instruction asked in the Circuit Court goes to the construction of the articles of copartnership. The plaintiff in error contends that those articles gave Winship no authority to raise money on the credit of the firm, or to bind it by his signature for the purpose of borrowing money.

The instruction given was that, if the particular terms of the articles were unknown to the public, they had a right to deal with the firm, in respect to the business thereof, upon the general principles and presumptions of limited partnerships of a like nature, and that any special restrictions did not affect them; that in such partnerships it was within the general authority of the partners to make and indorse notes, and to obtain advances and credits for the business and benefit of the firm, and, if such was the general usage of trade, the authority must be presumed to exist, but that it did not extend to transactions beyond the scope and object of the copartnership; that, in the present articles, Winship was, in effect, constituted the active partner, and has general authority to transact its ordinary business, with persons ignor-

ant of any private restriction, to the same extent that partners in such limited partnerships usually possess.

The amount of the charge is that if Winship and the two Binneys composed a joint company for carrying on the soap and candle business, of which Winship was the acting partner, he might borrow money for the business on the credit of the company, in the manner usually practiced in such partnerships, notwithstanding any secret restriction on his powers in any agreement between the parties, provided such restriction was unknown to the lender.

The counsel for the plaintiff in error has objected to this instruction with great force of reasoning. He contends, very truly, that in fact scarcely any unlimited partnerships exist. They are more or less extensive. They may extend to many or to few objects, but all are in some degree limited.

That the liability of a partner arises from pledging his name if his name is introduced into the firm, or from receiving profits if he is a secret partner.

No man can be pledged but by himself. If he is to be bound by another, that other must derive authority from him. The power of an agent is limited by the authority given him; and, if he transcends that authority, the act cannot affect his principal. He acts no longer as an agent. The same principle applies to partners. One binds the others so far only as he is the agent of the others.

If the truth of these propositions be admitted, yet their influence on the case may be questioned. Partnerships for commercial purposes, for trading with the world, for buying and selling from and to a great number of individuals, are necessarily governed by many general principles, which are known to the public, which subserve the purpose of justice, and which society is concerned in sustaining. One of these is that a man who shares in the profits, although his name may not be in the firm, is responsible for all its debts. Another, more applicable to the subject under consideration, is that a partner, certainly the acting partner, has power to transact the whole business of the firm, whatever that may be, and consequently to bind his partners in such transactions as entirely as himself. This is a general power, essential to the well conducting of business, which is implied in the existence of a partnership When, then, a partnership is formed for a particular purpose, it is understood to be in itself a grant of power to the acting members of the company to transact its business in the usual way. If that business be to buy and sell, then the individual buys and sells for the company, and every person with whom he trades in the way of its business has a right to consider him as the company, whoever may compose it. It is usual to buy and sell on credit; and, if it be so, the partner who purchases on credit in the name of the firm must bind the firm. This is a general authority held out to the world, to which the world has a right to trust. The articles of copartnership are, perhaps, never published. They are rarely, if ever, seen, except

by the partners themselves. The stipulations they may contain are to regulate the conduct and rights of the parties as between themselves. The trading world, with whom the company is in perpetual intercourse, cannot individually examine these articles, but must trust to the general powers contained in all partnerships. The acting partners are identified with the company, and have power to conduct its usual business in the usual way. This power is conferred by entering into the partnership, and is perhaps never to be found in the articles. If it is to be restrained, fair dealing requires that the restrictions should be made known. These stipulations may bind the partners, but ought not to affect those to whom they are unknown, and who trust to the general and well-established commercial law. 2 H. Bl. 235; 17 Ves. 412; Gow on Part. 17. * * *

The judgment is affirmed.[1]

BURGAN v. LYELL et al.

(Supreme Court of Michigan, 1856. 2 Mich. 102, 55 Am. Dec. 53.)

PRATT, J. This is an action of assumpsit, brought by the plaintiff in Wayne county court, for work and labor claimed to have been performed for the defendants in their mining business.

The cause was submitted to the court below on a written statement, in which it is admitted that the defendants impleaded in this suit included all the members of the company; that they all signed the original article of copartnership, and prosecuted the business of mining under them.

These concessions, thus made, constitute conclusive evidence, as against the defendants, of a partnership in fact, in which they are all, as partners, engaged in the business of mining. 2 Greenleaf, Ev. § 484. It further appears, from the case submitted, that Andrew Harvie, a member and one of the managers of the company, employed the plaintiff to perform the work in question. But whether his powers, as one of the managers of the company, were general, or special and limited, does not appear; nor is it material to a judicial determination of this cause, as every member, in legal contemplation, without any special powers being conferred upon him by the articles of copartnership, is not only a principal of the firm, but a general agent, for all the copartners, in the transaction of their legitimate company business (Story on Part. 1; Har. Ch. 172), each member being vested with power which enables him to act at once as principal, and all are regarded as being present and sanctioning the engagements and contracts which they may singly enter into within the scope of their partnership matters (Story on Part. 158, 159). Harvie, then, being one of the part-

[1] The dissenting opinion of Baldwin, J., is omitted.

ners, was vested with the right of contracting with the plaintiff, and any work performed by him for the company under the contract would legally bind all of the partners for the payment of it. Although Harvie, as a single member, was inhibited from making such a contract by some express provision of the articles of copartnership, still the rights of third persons, to whom such provision was unknown, would not be thereby affected, nor would it tend in the least to bar a third person, who had by the procurement of a single member, without notice, rendered services for the company, in recovering therefor in a suit against all. 2 Greenleaf, Ev. § 481; Story on Part. 193. The plaintiff, by the procurement of Harvie, as appears by the case, labored for the company in their mining operations nine months and two days, at $18 per month. In this labor of the plaintiff all the partners are interested, and in judgment of law all are presumed to have been cognizant of its performance, and to have derived at least some benefit from it; hence all are, as they should be by every principle of justice, held equally responsible to the plaintiff for the payment of the services thus rendered. And as regards their joint liability it is a matter of no legal moment whether some of the partners were dormant in fact, or whether they subsequently assented to, or dissented from the proceedings of those with whom they had entrusted the management of their company business. They would, nevertheless, be jointly liable to the plaintiff for his work.

After the services were rendered, the plaintiff, as appears by the case, made out an account therefor against the company, the balance of which, after deducting some small sums which had been paid and credited, amounted to $147.43, on which John Greenfield, their superintending agent of the hands employed on the mining location, certified to John Winder, a member and also one of the managers of the company, that the account was correct, and that the balance thereof was due to the plaintiff. Winder afterwards, on presentation of the account and certificate to him, paid to the plaintiff $10, which was indorsed thereon.

It is a well-settled principle of law "that the acknowledgment by one partner, during the continuance of the partnership, of a debt as due by the partnership, will amount to a promise binding the firm." The certificate of the superintending agent, and the recognition of the account by a member and one of the managers of the company, constitute sufficient evidence of such acknowledgment. "And so a part payment of a debt of a firm by one partner, during the continuance of the partnership, will not only extinguish pro tanto the partnership debt, but will operate as an admission of the existence of the residue of the debt, binding on all the partners." Story on Partnership, p. 160.

These are rules of law about which there has never been any disagreement, either by legal authors or courts of last resort; and by them all the members of this company are equally liable to the plaintiff for the payment of the balance due him on the account. * * *

The opinion, therefore, of this court, is that the plaintiff is entitled to judgment for the balance of his account and interest from the time of its liquidation.[1]

SECTION 2.—TEST OF AUTHORITY—NATURE OF QUESTION.

POOLEY et al. v. WHITMORE.

(Supreme Court of Tennessee, 1873. 10 Heisk. 633, 27 Am. Rep. 733.)

BURTON, J. Pooley, Barnum & Co. sued Edwin Whitmore & Co. on two promissory notes, of $185 each, made by W. A. Whitmore, payable at six and nine months, respectively, to the order of "Whitmore Bros.," and indorsed in that name. Whitmore Bros., a firm composed of Edwin Whitmore and the said W. A. Whitmore were partners in publishing the Public Ledger newspaper in the city of Memphis, and also conducted a general job printing office in that city. The notes in suit, however, were drawn and indorsed by W. A. Whitmore in discharge of a private debt that he owed to one Cannon. Edwin Whitmore is the surviving partner of the firm, and puts in a special plea of non est factum, and insists that the firm is not bound to pay, on the ground that it is not a partnership debt. Defendants in error reply that they are bona fide purchasers for value of the note in due course of trade, and therefore are entitled to recover, notwithstanding the wrong or fraud of W. A. Whitmore in using the partnership name in a personal transaction.

The court below instructed the jury that "as a general rule one partner is not liable for the act of another partner not within the scope of the partnership business; that if one partner sign a promissory note

[1] "Everybody knows that partnership is a sort of agency, but a very peculiar one. You cannot grasp the notion of agency, properly speaking, unless you grasp the notion of the existence of the firm as a separate entity from the existence of the partners—a notion which was well grasped by the old Roman lawyers, and which was partly understood in the courts of equity before it was part of the whole law of the land, as it is now. But, when you get the idea clearly, you will see at once what sort of agency it is. It is one person acting on behalf of the firm. He does not act as agent, in the ordinary sense of the word, for the others, so as to bind the others. He acts on behalf of the firm of which they are members; and as he binds the firm, and acts on the part of the firm, he is properly treated as the agent of the firm. If you cannot grasp the notion of a separate entity for the firm, then you are reduced to this: that inasmuch as he acts partly for himself and partly for the others, to the extent that he acts for the others he must be an agent, and in that way you get him to be an agent for the other partners, but only in that way, because you insist upon ignoring the existence of the firm as a separate entity." Per Jessel, M. R., in Pooley v. Driver, 5 Ch. D. 458, 476 (1876).

or other negotiable paper in the firm name, without the knowledge or consent of the other partner, and for a matter not within the scope of the partnership business, the other partner will not be liable, unless he ratify the act, or unless the paper get into the hands of some purchaser before maturity who had no knowledge or notice of the consideration between the original parties, and who paid a valuable consideration for the paper; that such a person would be an innocent holder for value and without notice."

The above instructions are not accurate, without important qualifications, and were certainly calculated, as we think, to mislead the jury, in view of the facts of this case.

Every member of an ordinary partnership is its general agent for the transaction of its business in the ordinary way, and the firm is held responsible for whatever is done by any of its partners, when acting for the firm, within the limits of the authority conferred by the nature of the business it carries on. Every person is entitled to assume that each partner is empowered to do for the firm whatever is necessary for the transaction of its business, in the way in which that business is ordinarily carried on by other people. But no person is entitled to assume that any partner has more extensive authority than that above described. It will be observed that what is necessary to carry on the partnership business in the ordinary way is made the test of an authority when no actual authority or ratification can be proved. This is conforming to the most recent and carefully considered decisions; but, by adopting it, the liability of a firm for the acts of its copartners is not so extensive as now lawyers sometimes imagine.

The question whether a given act can or cannot be necessary to the transaction of the business in the way in which it is usually carried on must evidently be determined by the nature of the business and by the practice of persons engaged in it. Evidence on both of these points is necessarily admissible, and, as readily may be conceived, an act which is necessary for the prosecution of one kind of business may be wholly unnecessary for the carrying on of another in the ordinary way. Consequently no answer of any value can be given to the abstract question, can one partner bind his firm by such an act? unless, having regard to what is usual in business, it can be predicated of the act in question either that it is one without which no business can be carried on or that it is one which is not necessary for carrying on any business whatever. There are obviously very few acts of which such an affirmation can be truly made. The great majority of acts which give rise to doubt are those which are necessary in one business and not in another. Take, for example, negotiable instruments. It may be necessary for one member of a firm of bankers to draw, accept, or indorse a bill of exchange on behalf of the firm, and to require that each member should put his name to it would be ridiculous; but it by no means follows, nor is it in fact true, that there is any necessity for one of several solicitors to possess a similar power, for it is no

part of the ordinary business of a solicitor to draw, accept, or indorse bills of exchange. The question, therefore, can one partner bind the firm by accepting bills in its name? admits of no general answer. The nature of the business and the practice of those who carry it on (usage or custom of the trade) must be known before any answer can be given. Lindley on Partnership, 198–200. It is further said by the same author: "It is clearly settled that any member of an ordinary trading partnership can bind the firm by drawing and indorsing promissory notes in its name. But, in respect to partnerships which are not trading partnerships, the question whether one partner has any implied authority to bind his copartners by putting the name of the firm to a negotiable instrument depends upon whether the business of the partnership is such that dealings in negotiable instruments are necessary for its transaction, or are usual in partnerships of the same description. In the absence of evidence showing necessity or usage, the power has been denied to one of several mining adventurers, quarry workers, farmers, and solicitors." Id. 213, 214.

The foregoing principles, as we think, have been fully recognized by this court in Crosthwait v. Ross, 1 Humph. 23, 34 Am. Dec. 613, where the distinction between partners in trade and partners in occupation or employment is taken, and the power of the former class to bind the firm by drawing or indorsing notes and bills is sustained, while it is denied to the latter class. It is there held that one partner in the practice of physic could not bind the firm by drawing a bill or making a note on which to raise money, because it was not within the scope of their partnership, and it was distinctly holden that the power to raise money was not one of the implied powers resulting from such an association. By recurring to the instructions given by the court below in this case, it will be seen that this important distinction between strictly commercial or trading partnerships and partnerships in occupation is entirely ignored, and we think it was the duty of the court to point out the distinction, for prima facie it cannot be said that one partner in a printing office would have the implied power to bind the firm by drawing or indorsing a note. In this case, to be sure, there was some evidence of the usage of this firm to deal in commercial paper; but there was also evidence tending to the contrary conclusion. The consequence of this distinction between trading and nontrading partnerships is very important in reference to the main defense to be relied upon in this case. If a partner in a banking firm, for instance, should indorse a bill or note for his private debt, and it should get into the hands of a bona fide holder without notice, his firm would be bound by it. The indorsing or making of such paper being the usual mode of conducting that business, the public have a right to suppose that each partner is empowered to accept or indorse for the firm, and are not bound to inquire whether in a given instance the act was done with the assent of his copartners. But not so with a partnership occupation merely, whose business does not ordinarily require

dealing in commercial paper. One who becomes a member of such a firm does not confer implied power on his copartners to bind him by dealing in bills or notes. He is not clothed with apparent power so to bind his firm, and no person dealing with the firm has the right to suppose that the powers of one member are more extensive than is implied by the ordinary mode of conducting such business. If two persons are associated in the practice of law, and one of them, without or against the consent of the other, should indorse a note or bill for his private purpose, no one buying such bill could succeed on the plea that he was a bona fide holder without notice, for the reason that by forming such an association the several partners do not hold each other out to the world as empowered to use their names as makers or indorsers of negotiable paper.

The rules in regard to notice to a purchaser are very accurately laid down in our own cases, digested in Heiskell, and contain a much more accurate statement of the law upon the subject than is contained in this charge, and one much more applicable to the facts of the case.

Our conclusion is that the charge of the court in reference to the facts of this case, if it does not amount to a positive misstatement of the law, was calculated to mislead the jury, and that the appellant is entitled to a new trial, although he failed to ask further instructions to the jury.

On hearing this cause at a former term, the court decided to grant a new trial, and it is now before us on application to reconsider the conclusion at which the court then arrived.

On a reconsideration of the case, we adhere to our former opinion, and reverse the judgment of the municipal court, and remand the cause for a new trial in accordance with the principles herein announced.

IRWIN v. WILLIAR et al.

(Supreme Court of the United States, 1883. 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225.)

The defendants in error were plaintiffs below, and brought this action against the plaintiff in error, as surviving partner of the firm of Irwin & Davis, to recover a balance alleged to be due, growing out of certain sales of wheat for future delivery, claimed to have been made by the defendants in error for the firm of Irwin & Davis upon their order. The liability of the plaintiff in error was denied on two grounds: (1) That the transactions were made by Davis, the deceased partner, without the knowledge, assent, or authority of the plaintiff in error, and were not within the scope of the partnership business; and (2) that the sales were wagering contracts and void.

[The bill of exceptions, stating the evidence, and the charge given to the jury, is omitted.]

MATTHEWS, J. The proposition contained in this charge is that the business of dealing in grain, no matter how much it may be restricted by agreement between the partners, and no matter how it may have been qualified by the actual practice of the firm, necessarily authorizes each partner to bind the others by unknown contracts in distant markets for unlimited sales and purchases of grain for future delivery. And so the jury must have understood it; for they were told that, "if Irwin permitted Davis to hold himself and Irwin out to the world as partners in the business of dealing in grain, he became liable with Davis on contracts for the sale and purchase of grain for future delivery, and in that case it is not material that Irwin should have actual knowledge of particular sales or purchases in the firm name," and "if Davis, as partner, did in fact buy and sell grain, and if, in his correspondence with customers and others, including the plaintiffs, he employed printed letter heads or cards representing the firm of Irwin & Davis as grain dealers, this was a holding out of that firm as a partnership engaged in that business," and "if, therefore, you believe from the evidence that Irwin & Davis held themselves out as dealers in grain, as well as in flour, and that the plaintiffs dealt with Davis, supposing they were dealing with the firm," etc., "you should find for the plaintiffs," etc. This was equivalent to directing the jury to find a verdict for the plaintiffs in the action, for the only facts to which their attention was directed as material were not disputed, viz., that the firm had been in the habit of buying and selling grain, and had constantly used letter heads describing themselves as dealers in grain.

In this, we think, there was error. The liability of one partner for acts and contracts done and made by his copartners, without his actual knowledge or assent, is a question of agency. If the authority is denied by the actual agreement between the partners, with notice to the party who claims under it, there is no partnership obligation. If the contract of partnership is silent, or the party with whom the dealing has taken place has no notice of its limitations, the authority for each transaction may be implied from the nature of the business according to the usual and ordinary course in which it is carried on by those engaged in it in the locality which is its seat, or as reasonably necessary or fit for its successful prosecution. If it cannot be found in that, it may still be inferred from the actual, though exceptional, course and conduct of the business of the partnership itself, as personally carried on with the knowledge, actual or presumed, of the partner sought to be charged.

In the present case the partnership agreement cannot affect the question, because it is not claimed, on the one hand, that it conferred actual authority to make the transactions in dispute, nor, on the other hand, that the defendants in error had any notice of its limitations.

And so, too, any implication that might have arisen from a previous course of business of this character, carried on by Davis with the

knowledge of Irwin, must be rejected; for it is not claimed that any foundation in proof existed for it.

The only remaining ground for the implied authority by which it can be claimed that Irwin was bound by the contracts of his partner is that arising from the intrinsic nature of the business in which the partnership was actually engaged, or from the usual and ordinary course of conducting it at the locality where it was carried on.

What the nature of that business in each case is, what is necessary and proper to its successful prosecution, what is involved in the usual and ordinary course of its management by those engaged in it, at the place and time where it is carried on, are all questions of fact to be decided by the jury, from a consideration of all the circumstances which, singly or in combination, affect its character or determine its peculiarities; and from them all, giving to each its due weight, it is its province to ascertain and say whether the transaction in question is one which those dealing with the firm had reason to believe was authorized by all its members. The difficulty and duty of drawing the inference suitable to each case from all its circumstances cannot be avoided or supplied by affixing or ascribing to the business some general name, and deducing from that, as a matter of law, the rights of the public and the duties of the partners. Dealing in grain is not a technical phrase from which a court can properly infer as matter of law authority to bind the firm in every case, irrespective of its circumstances; and if, by usage, it has acquired a fixed and definite meaning, as a word of art in trade, that is matter of fact to be established by proof found by a jury. * * *

As the judgment now under review would have to be reversed for the error just pointed out, it is not necessary, for the purpose of disposing of the present writ of error, to proceed further to examine other assignments; but as the case must be remanded for a new trial, in which the remaining questions may again arise, it seems appropriate now to dispose also of them. * * *

The judgment of the circuit court is therefore reversed, with directions to grant a new trial; and it is so ordered.[1]

[1] "In a commercial partnership the extent of a partner's power to bind the firm is a question of law, while in the noncommercial firm the power of one partner to bind his copartner is a question of fact, and the burden of proof to establish the facts as to the validity of contracts so executed by one member of such a partnership rests with the party claiming to hold the firm liable." Per Burnam, J., in Alsop v. Trust Co., 100 Ky. 375, 38 S. W. 510 (1897).

SECTION 3.—PARTICULAR POWERS CONSIDERED.[1]

ROTHWELL v. HUMPHREYS et al.

(At Nisi Prius, before Lord Kenyon, C. J., 1795. 1 Esp. 406.)

Assumpsit for money lent. Plea of the general issue. The defendants were partners, linen drapers, in London. The plaintiff was a fustian manufacturer at Manchester. Howell, one of the defendants, had gone down to Manchester to purchase goods in the way of his trade, and had, in fact, purchased from the plaintiff to the amount of £500. Being about to return, he borrowed £10 from the plaintiff to defray his expenses to London; and, having drawn a bill on the house in London for the amount of the goods, he included in it the £10 so borrowed, and the bill was drawn for £510. Before the arrival of the goods in London, Humphreys and Howell, the defendants, became insolvent, and the plaintiff stopped the goods in transitu, so that the bill was never presented; and the action was brought to recover the £10 lent only. These facts were proved by a witness called by the plaintiff. The defense relied upon was that the action was brought against both partners for a loan of money, admitted by the evidence to have been made to one of them, and which, therefore, could not be supported.

Lord KENYON said that, though the loan of money was to one of the partners, it was lent to him while employed on the partnership business and on its account; that as such it was competent to him to bind the partnership to the payment of a debt so contracted, and which, in fact, he had done, by including the money lent in the same bill with that for goods sold clearly on the partnership account.

Verdict for the plaintiff.

BOND v. GIBSON et al.

(At Nisi Prius, before Lord Ellenborough, C. J., 1808. 1 Camp. 185.)

Assumpsit for goods sold and delivered. It appeared that, while the defendants were carrying on the trade of harness makers together, Jephson bought of the plaintiff a great number of bits to be made up into bridles, which he carried away himself; but that, instead of bringing them to the shop of himself and his copartner, he immediately pawned them to raise money for his own use.

Gazelee, for the defendant Gibson, contended that this could not be considered a partnership debt, as the goods had not been bought on

[1] The power of a partner to sell, mortgage, or assign the firm property has already been considered in chapter III, section 7 (II), to which cases the student is referred.

the partnership account, and the credit appeared to have been given to Jephson only. He allowed the case would have been different, had the goods once been mixed with the partnership stock, or if proof had been given of former dealings upon credit between the plaintiff and the defendants.

Lord ELLENBOROUGH. Unless the seller is guilty of collusion, a sale to one partner is a sale to the partnership, with whatever view the goods may be bought, and to whatever purposes they may be applied. I will take it that Jephson here meant to cheat his copartner; still the seller is not on that account to suffer. He is innocent; and he had a right to suppose that this individual acted for the partnership.

Verdict for the plaintiff.

STECKER, Adm'x, v. SMITH et al.

(Supreme Court of Michigan, 1881. 46 Mich. 14, 8 N. W. 583.)

GRAVES, J. Plaintiff's intestate brought assumpsit against the defendant as copartners before a justice of the peace to recover for certain brick furnished them. A recovery was allowed in that court, and defendants appealed; but prior to the trial in the circuit court Mr. Stecker died, and the plaintiff was duly authorized to assume the prosecution of the action. On the hearing of the case the circuit judge directed a verdict for the defendants. The plaintiff claimed that the defendants were partners in putting up two certain buildings, and that the bricks were procured by the firm for those buildings and actually used as materials therein.

A witness for the plaintiff testified that one of the defendants contracted individually for the brick, and another witness on the same side testified that one of the defendants admitted that brick were received, but that they were on his own account, and not for the partnership. The plaintiff then offered to show that the defendants were in partnership in putting up the buildings for which the brick were obtained and in which they were used, but the court on objection excluded the evidence.

This was error. The statement made by the witness that the brick were purchased by one of the defendants on his individual account was not necessarily conclusive. In the first place, it was more matter of opinion than of fact, as represented by the record. But in any court the plaintiff was entitled to lay all the facts before the jury and have their judgment on the question whether the purchase was not a partnership transaction, or at least one which entitled the plaintiff to charge the defendants as partners. If in point of fact they were erecting the buildings as partners, and one of them procured the brick for the purpose of the buildings, without any express arrangement with

the plaintiff's intestate that the purchase was an individual purchase, and the brick were used in the buildings, the firm was liable.

The judgment is reversed, with costs, and a new trial granted.

LEFFLER et al. v. RICE.

(Supreme Court of Indiana, 1873. 44 Ind. 103.)

DOWNEY, C. J. The appellee sued the appellants for work and labor, for money loaned, for money had and received, for board and lodging, and for wood, provisions, and merchandise, a bill of particulars of which was filed with the complaint. The defendants answered in three paragraphs: (1) A general denial. (2) Payment. (3) Set-off. Reply in denial of the second and third paragraphs of the answer. Trial by the court, finding for the plaintiff, motion for a new trial overruled, and final judgment for the plaintiff.

It is urged as a question of law that Rice, one of the defendants, could not bind Leffler, his partner, for the items in question, for the reason that they were foreign to the business of the firm. Two of the items claimed by the appellee were for money loaned, one was for money paid for middlings, and one was for services in the purchase of grain, etc. The business of the defendants was that of milling. We do not see that the items of indebtedness are such as might not properly and reasonably have accrued in connection with the business. We are aware of the rule of law, stated by the counsel for appellants, that where a person takes a security from one partner in the name of the partnership, in a transaction not in the usual course of dealing, he takes the security at his peril. Money may properly be borrowed by a partner to be used in the business of milling by the firm. The evidence of the plaintiff tends to show that the middlings in question were purchased to be ground over at the mill of the defendants, which would seem to be properly connected with the business of milling; and as to the compensation for purchasing grain for the mill there cannot well be any question.

The judgment is affirmed.

PORTER v. CURRY.

(Supreme Court of Illinois, 1869. 50 Ill. 319, 99 Am. Dec. 520.)

LAWRENCE, J. Curry and Majors were partners in the manufacture of wagons, and in August, 1867, sold a wagon to Porter, the appellant, for $110, for which he gave his note. Soon afterwards Porter, by an arrangement with Majors, sold the latter a mare for $200, and received therefor his own note and one executed by Majors for $90. Porter swears, however, that Majors claimed to be purchasing the

horse for the use of the firm, and on the credit of the firm, and that he himself supposed he was taking the firm note, instead of the individual note of Majors, and, not being able to read, did not discover his error until Majors absconded and he showed his note to a neighbor. Majors absconded to Missouri a few days after the purchase, taking with him the mare. Curry pursued Majors, obtained possession of the mare, and sold her. Porter brought this suit against the firm to recover the $90, and it is resisted on the ground that the mare was not required in the business, and therefore Majors had no power to buy her on the firm credit.

It is clear, however, even if the purchase of a horse was not within the scope and usage of such a partnership as existed between Curry and Majors, yet if the mare was in fact purchased on the firm credit, and if Curry afterwards claimed her from Majors as firm property, and obtained possession of her on that ground, he thereby ratified the act of Majors in buying her on the partnership credit. He cannot be permitted, at the same moment, to claim the benefit of the purchase and deny its obligations. This view of the law was embodied in the sixth and seventh instructions asked by the plaintiff, and they should have been given. For the same reason the first instruction given for the defendant should have been refused. It puts the case to the jury wholly on the question of an original power by Majors to buy on the firm credit, and makes the case turn entirely upon that, leaving the question of ratification altogether out of view.

The judgment is reversed and the cause remanded.

Judgment reversed.

DUNCAN v. LOWNDES et al.

(At Nisi Prius, before Ellenborough, C. J., 1813. 3 Camp. 478.)

This was an action on a guaranty alleged to have been given by the defendants for the due payment of a bill of exchange to the plaintiff for £670 15s., accepted by Dickinson & Co., for the price of goods which the plaintiff had sold them.

It appeared that the two defendants carried on business together as merchants at Liverpool, and that this guaranty was signed by Lowndes in the partnership firm.

Lord Ellenborough. As it is not usual for merchants, in the common course of business, to give collateral engagements of this sort, I think you must prove that Lowndes had authority from Bateson to sign the partnership firm to the guaranty in question. It is not incidental to the general power of a partner to bind his copartners by such an instrument.

The plaintiff, however, was not prepared with any evidence to affect Bateson, and submitted to be nonsuited.

ROLLINS v. STEVENS et al.

(Supreme Court of Maine, 1850. 31 Me. 454.)

Assumpsit upon a promissory note. The defendants were defaulted by consent, subject to the opinion of the court as to their liability. The note was signed: "John O. P. Stevens, Principal. W. & H. Stevens, Sureties."

William Stevens and Hiram Stevens were copartners in navigation and business of commerce, under the style of W. & H. Stevens. Their company name was affixed to the note, in the form above stated, by Hiram Stevens.

WELLS, J. It appeared by the evidence that Hiram Stevens signed the name of the firm, consisting of himself and William Stevens, to the note in suit as sureties for the other maker. One partner has no authority thus to use the name of the firm, out of the scope of the copartnership business, unless the consent or subsequent ratification of the other is obtained. The note, on its face, indicates that it was given for the debt of the principal, and not for the debt of the firm. And the burden of proving such consent or ratification rests on the plaintiff. The plaintiff's intestate could not claim to be an innocent holder, without the knowledge of such want of authority; for the form of the contract was information to him that the firm had no interest in it, they being partners in navigation and the business of commerce. Bayley on Bills, 58; Manufacturers' & Mechanics' Bank v. Winship, 5 Pick. (Mass.) 11, 16 Am. Dec. 369; 3 Kent's Com. 47; Gow on Partnership, 58; Foot v. Sabin, 19 Johns. (N. Y.) 154, 10 Am. Dec. 208.

According to the agreement of the parties, the default as to William Stevens is to be taken off, and the action to stand for trial.

MORGAN et al. v. RICHARDSON.

(Supreme Court of Missouri, 1852. 16 Mo. 409, 57 Am. Dec. 235.)

SCOTT, J. This was a proceeding to set aside a judgment and execution thereon, confessed in vacation, in the name of A. & J. M. Richardson, to the appellants, under the twenty-second article of the new Code of Practice. Achilles and J. M. Richardson were partners in trade, and indebted to the appellants for merchandise. The indebtedness was evidenced by a promissory note, executed in the name of the firm. The confession was authorized by J. M. Richardson alone, and after the dissolution of the partnership between him and Achilles Richardson. The execution was levied on goods belonging to A. Richardson. The court below set aside the judgment against A. Richardson, and quashed the execution.

1. The facts in this case stand admitted by the demurrer to the petition, and we are at a loss to conceive the ground upon which the proceeding can be sustained against A. Richardson. The case of Green v. Beals, 2 Caines (N. Y.) 254, is an authority to show that the judgment confessed by J. M. Richardson was void as to A. Richardson. The cases of Motteux v. St. Aubin, 2 W. Bl. 1133, and Denton v. Noyes, 6 Johns. (N. Y.) 296, 5 Am. Dec. 237, are not applicable to the circumstances of this case. It cannot be maintained that a partner, either before or after the dissolution of the copartnership, has authority to confess a judgment for his copartner. The authorities are abundant to show that one partner cannot confess a judgment which will bind his copartner. Crane v. French, 1 Wend. (N. Y.) 311; McBride v. Hagan, 1 Wend. (N. Y.) 327. We can see no difference in principle between setting aside the judgment and restraining an execution upon it, as either mode of action is based upon the nullity of the proceeding, which is not permitted to be used as a foundation for any future action aganist the party for whom it has been unwarrantedly entered.

It does not appear that the judgment against J. M. Richardson has been vacated, nor will we interfere with it. The other judges concurring, the judgment below will be affirmed.

PINKNEY v. HALL.

(Court of Kings Bench, 1696. 1 Salk. 126.)

By the custom of England, where there are two joint traders, and one accepts a bill drawn on both for him and partner, it binds both, if it concerns the trade; otherwise, if it concerns the acceptor only in a distinct interest and respect.

HEDLEY v. BAINBRIDGE et al.

(Court of Queen's Bench, 1842. 3 Adol. & E. 316.)

Assumpsit on a promissory note made by defendant, payable to plaintiff on demand. Defendant denied making the note. Plaintiff nonsuited. A rule nisi granted to show cause why verdict should not be entered for plaintiff.

Lord DENMAN, C. J. The defendant and a Mr. Spurrier were in partnership as attorneys. A sum of money was deposited with Mr. Spurrier by the plaintiff, a client of the firm, to be laid out on a mortgage; and he gave the plaintiff the promissory note of the firm for the amount. The question is whether, under those circumstances, Spurrier had power to bind the firm by such note. No doubt a debt was due from the firm; but it does not follow that one partner had

authority to give a promissory note for that debt. Partners in trade have authority, as regards third persons, to bind the firm by bills of exchange, for it is in the usual course of mercantile transactions so to do; and this authority is by the custom and law of merchants, which is part of the general law of the land. But the same reason does not apply to other partnerships. There is no custom or usage that attorneys should be parties to negotiable instruments; nor is it necessary for the purposes of their business. * * * Upon the whole we think that the implied authority is confined to partners in trade, and that the nonsuit in this case was right.

Rule discharged.

PEASE v. COLE.

(Supreme Court of Errors of Connecticut, 1885. 53 Conn. 53, 22 Atl. 681, 55 Am. Rep. 53.)

LOOMIS, J. The question involved in this case is whether one member of a copartnership formed for the purpose of conducting a theater in Hartford could, under the circumstances mentioned in the finding, bind the other member by executing a negotiable promissory note in the name of the firm for money borrowed. The finding, in terms, excludes all express authority of the other partner, and even all knowledge of the matter on his part. So that any conclusion that the note is the note of the firm, rather than of the member executing it, must necessarily rest on an authority to be implied. But here, again, the facts found so circumscribe the range of inquiry as to exclude all the ordinary sources of such authority. The circumstances from which an authority may be implied are identical with those involved in a question of ordinary agency, for each partner is regarded as the accredited agent of the rest. In many cases the decisive fact is found in the customary course of dealing; but not so here, for it is found that the note in question was the only note ever given in the name of the firm. The copartnership first commenced business in August, 1883, and on the 24th of the same month the note in suit was given. There was therefore very little time for a course of conduct or usage of any sort to grow up, giving any apparent authority. The finding traces the money borrowed only into the hands of McCarthy the partner who signed the firm name, and no fact appears showing, directly or presumptively, that the act was necessary for any of the purposes of the partnership. The only remaining source from which an authority may be derived by implication must be sought in the nature and scope of the partnership and in the nature of the act; and here, if we examine the legal principles that are applicable, it will be found, not only that all such implication is wanting, but that the presumption is directly against the authority assumed. The weight of authority in the United States, and the uniform tenor of the authorities in England, will be

found to establish a controlling distinction in respect to implied authority between commercial or trading and nontrading partnerships. Story, Partn. (6th Ed.) § 102a; 1 Lindl. Partn. (4th Ed., by Ewell), top p. 266, and note 1, and cases there cited; 1 Colly. Partn. 618, 658; Metc. Cont. 121, and cases cited in the notes.

In a commercial partnership each acting partner is its general agent, with implied authority to act for the firm in all matters within the scope of its business; and the presumption of law is that all commercial paper which bears the signature of the firm, executed by one of the partners, is the paper of the partnership, for the reason that the giving of such notes would be within the usual course of mercantile transactions. But when we pass to nontrading partnerships the doctrine of general agency does not apply, and there is no presumption of authority to support the act of one partner. Hence, in order to subject the firm upon a bill or note executed by one partner in its name, a course of conduct, or usage, or other facts sufficient to warrant the conclusion that the acting partner had been invested by his copartners with the requisite authority, must appear, or that the firm has ratified the act by receiving the benefit of it. That the partnership in question belongs to the nontrading class seems so obvious as to need no discussion. The brief in behalf of the defendant Cole cites many cases, and gives a long list of pursuits and professions which those cases establish as of the nontrading class, and, although the conduct of a theater is not there mentioned, yet the analogies manifestly include it. To show the existence of the distinction contended for, and its application, we select from a multitude of authorities the following, in addition to those previously referred to: * * *

Many more authorities equally pertinent might be cited, but these will suffice to show that the distinction relied upon is strongly supported both in England and in the United States. While we feel constrained to adopt the distinction between the two classes of partnership so far as the presumption of authority or the want of it is concerned, we do not deem it necessary for the purposes of this case, or even quite reasonable, to carry its application so far as to deny absolutely, as some of the cases do, the right to recover on a note given by a nontrading firm for money borrowed for the firm and appropriated to its use, or on a note given in payment of its debts. Some authorities ignore the test of liability referred to, but adopt another, which is equivalent in result. Chancellor Kent, in his chapter on Partnerships in the third volume of his Commentaries (7th Ed. p. 41), omits the use of the terms "trading" and "nontrading," and makes the distinction between partnerships, in respect to the power of one partner to bind the firm, depend on the single test of the usual scope of the business, in connection with the subject-matter of the contract. This rule was adopted in Crosthwait v. Ross, 1 Humph. (Tenn.) 23, 34 Am. Dec. 613, where it was held that one partner in the practice of medicine could not bind the firm by drawing a bill or note on which

to raise money, because it was not within the scope of the partnership business. Though under a different name, the real distinction here taken is between partners in trade and partners in an occupation. Afterwards the same court, in the case of Pooley v. Whitmore, 10 Heisk. (Tenn.) 629, 27 Am. Rep. 733, in a most able and elaborate opinion, held that the liability of a partnership firm of the nontrading class to a bona fide holder of negotiable paper without notice, upon a note indorsed in its name by a member for his own benefit, would depend upon the nature of the business, the usage of trade, and the course of dealing of the particular firm. It was also held that, where the nature of the partnership is such that it may or may not be proper to deal in negotiable instruments (as in that case, which was a publishing company), it was error in the circuit judge to charge, without qualification, that the firm was liable if the holder received the note before maturity, in the due course of trade, and without notice. We think the same principle, under the circumstances of the case at bar, made it error in the court below to hold the firm liable. This court hitherto has had no occasion to give prominence to the distinction under discussion. The nature of the partnership business has, however, been made a ground for a presumption and a test of liability. In Walcott v. Canfield, 3 Conn. 194, the defendants were partners in running a line of stages from Hartford to Albany and back. One of the partners by an advertisement promised to transport passengers and leave them at Albany in a specified time, upon which agreement the suit was based. The advertisement, being the act of one partner, was held not even admissible in evidence against the firm, without previously establishing the authority of that one to bind the others. Hosmer, C. J., in delivering the opinion, on page 198, said: "A copartnership formed to transport passengers and their baggage in a stage does not authorize one of the partners to bind the firm by an agreement that he will convey a person a certain distance within a specified time. Unless he had special authority, he could only obligate himself by a contract not within the scope of the connection, and not his partners, who had never expressly or impliedly assented." The subject-matter of the contract was different from the case at bar, but it seems even more closely connected with the scope of the business than the giving of the note in suit.

Many authorities lay down the unqualified proposition, as if it was applicable to all partnerships, that if one partner raises money on a negotiable bill or note signed or indorsed in the name of the firm, and which comes into the hands of a bona fide purchaser, the partnership is bound, although it was in fact for the individual use of the acting partner. The doctrine is so stated in substance by this court in New York Firemen's Ins. Co. v. Bennett, 5 Conn. 574, 13 Am. Dec. 109. The case shows that the partnership was a commercial one. We do not say, however, that public convenience does not demand the same rule in the case of noncommercial partnerships where the holder was not

advised of the nature of the partnership and its course of dealing, or of other circumstances to put him on inquiry, and where the circumstances would justify the belief that he was dealing with the partnership. We may well leave this for future consideration, for, upon the facts found, we think the plaintiff's right was impaired by reason of what he knew in connection with the circumstances. We do not forget that the court below, in terms, found that the plaintiff purchased the note in good faith without notice of any defect. This, of course, means simply that there was no actual bad faith and no actual notice, and, as matter of fact, it is final; but at the same time the court found special facts as to the plaintiff's knowledge and action which we must also consider, and, if we find constructive notice or constructive fraud, the law must prevail.

The plaintiff, as holder, must stand affected by the nature of the partnership, of which he was fully advised. He purchased the note in the face of the presumption that it was unauthorized. To show the general nature of the facts which courts have held to be constructive notice, we cite a few cases. In Livingston v. Roosevelt, 4 Johns. (N. Y.) 278, 4 Am. Dec. 273, A. and B. formed a copartnership under the style of A. & Co., in the business of sugar refining, and so advertised in the newspapers. B. afterwards, without the knowledge of A., bought a quantity of brandy, for which he gave a note indorsed by him with the name of the firm. The plaintiff, who was an indorsee of the note, took the newspapers in which the firm's business was advertised. Kent, C. J., after commenting on certain facts tending to show that the plaintiff knew that the purchase of the brandy was not a partnership concern, proceeded to lay down these principles: "But if the plaintiff did not in fact know that the purchase was made by C. J. Roosevelt on his own account, and acted under the mistaken impression that it was a partnership purchase, still the firm were not bound by the indorsement, because the facts disclosed amounted to constructive notice or notice in law. * * * When a person deals with one of the partners in a matter not within the scope of the partnership, the intendment of the law will be that he deals with him on his private account, notwithstanding the partner may give the partnership name, unless there be circumstances to destroy that presumption. 'If,' says Lord Eldon (Ex parte Bonbonus, 8 Ves. 544), 'under the circumstances the person taking the paper can be considered as being advertised that it was not intended to be a partnership proceeding, the partnership is not bound.' Public notice of the object of a copartnership, the declared and habitual business carried on, the store, the counting house, the sign, etc., are the usual and regular indicia by which the nature and extent of a partnership are to be ascertained. When the business of a partnership is thus defined and publicly declared, and the company do not depart from that particular business, nor appear to the world in any other light than the one thus exhibited, one of the partners cannot make a valid partnership engagement on any

other than a partnership account. * * * When the public have the usual means of knowledge given them, and no means have been suffered by the partnership to mislead them, every man is presumed to know the extent of the partnership with whose members he deals." In 1 Collyer on Partnership, p. 650, it is said that "a note given by one partner in the partnership name, within the scope of the partnership, is binding upon the firm, but the payee is bound to know whether it is within the scope of his apparent authority, and, if it is in excess thereof, the firm is not responsible." In Cocke v. Bank, 3 Ala. 175, the note in suit was signed in the partnership name of J. F. & W. Cocke, who were partners in keeping a tavern. It was executed by J. F. Cocke, and payable to Lea & Langdon for their accommodation, without the knowledge of the other partner, Woodson Cocke. No actual knowledge of the circumstances was shown on the part of the bank, which sued an indorsee; but it was assumed to have been the duty of the bank to make inquiry. Goldthwaite, J., in delivering the opinion, said (page 180): "The law presumes that the bank, if it inquired at all into the partnership of the defendants, must have received information that they were not partners in a mercantile trade, but only in the business of tavern keeping. This ascertained, it took the note at its peril, and must have relied on the faith of the indorsers." It was held that Woodson Cocke, the partner who had no knowledge of the transaction, was not liable.

In the case at bar the plaintiff had full and actual knowledge of the nature of the partnership, and the law attributed to him knowledge, also, that one partner could not bind the other by bill or note without authority, and knowing, as he did, that the note had been written and signed by McCarthy, who was irresponsible, and that, if he purchased it, it would be upon the credit of Cole alone, and having also actual knowledge of a course of dealing which avoided McCarthy and pointed to Cole alone as the financial representative of the firm, it seems to us the plaintiff took the note at his peril. It was very strange for the plaintiff to inquire of the one who had used the firm name if it was the note of the firm, and omit entirely, when he had ample and easy opportunity, to inquire of the other partner, on whose sole credit he depended; but the court has found that the failure to inquire of Cole was not owing to a belief that the inquiry would result in finding the note invalid, and this we must accept as true. Ordinarily such a finding would save the rights of a holder in good faith of negotiable paper, but the great difficulty in the present case is that the note was purchased with constructive notice that it was not within the apparent scope of the partnership business, and prima facie was not the note of the firm; and the actual course of business, so far as it was known to the plaintiff, tended to increase rather than allay the suspicion of a want of authority.

But the plaintiff contends that the judgment in his favor cannot be disturbed because the burden of proof was on the defendant. On

this general subject of the burden of proof, most of the authorities cited in another connection to show the distinction between the two classes of partnerships, and many others that we might cite, assert most positively that in the case of noncommercial partnerships the burden is on the holder of the note. But we concede that many cases can be found which in terms would seem to place the burden on the defendant. In some of these cases the partnerships were in fact commercial, as in the case of Faler v. Jordan, 44 Miss. 283. In Doty v. Bates, 11 Johns. (N. Y.) 544, Platt, J., giving the opinion, said: "The partnership being admitted, the presumption of law is that a note made by one partner in the name of the firm was given in the regular course of partnership dealings, until the contrary is shown on the part of the defendants." The case is so brief in the report that we cannot see clearly what was involved in the admission of the partnership which furnished the basis for the presumption. It incidentally appears in the description of the firm that its business was tanning, currying, and shoemaking. This, doubtless, involved the buying of hides, bark, and materials for tanning, and the sale of leather and shoes. The basis of the presumption was doubtless the apparent scope of the business. In Holmes v. Porter, 39 Me. 157, the headnote omits an important qualification. The proposition laid down by the court is that, "when the contract is made in the name of the firm, it will prima facie bind the firm, unless it is ultra the business of the firm." The headnote omits the last clause. The case of Carrier v. Cameron, 31 Mich. 373, 18 Am. Rep. 192, was relied upon by the plaintiff to show that the burden was on the defendant. In terms it so holds, but a brief analysis will show that it is not inconsistent with our position in this case, and will suggest a mode of reconciling many apparently conflicting cases. There was nothing at all in the case to show the nature of the partnership, and the plaintiff's knowledge of it. Graves, C. J., in giving the opinion, stated the question as follows: "Was the plaintiff below required, in order to make out a prima facie case, to show in the outset that Carrier had express authority to make notes generally, or else to show either that the copartnership was one of the class in respect to which such authority is presumed, or that its course of business had been such as to imply authority, or that the signing by Carrier had been approved or ratified?" The question was answered in the negative, upon the authority of Littell v. Fitch, 11 Mich. 525. It is to be noticed that the question was simply as to the burden of proof after the fact of partnership was admitted, and before the nature or class of the partnership appeared. That being the position of the case, the court well remarked that "it was not needful for the plaintiff, by any positive averment or positive proof, to negative a defense which, in virtue of a general presumption, would be intended not to exist. He could not be required to go into particular proof on such a point until some proof should appear in contravention of the presumption." In this statement of the law we fully concur, but it is not applicable

to the facts in the case at bar, because the controlling fact in the proposition is wanting. Proof in contravention of the presumption, which at the outset was in favor of the plaintiff, had appeared, and had resulted in the finding of the opposing facts; and it is significant that all the facts which the above question impliedly concedes to be sufficient to overcome the presumption referred to are distinctly found, namely, that there was no express authority to make notes generally or to give this note; that the partnership was of the nontrading class, in respect to which no authority can be implied; that there was no course of business that could imply authority; and that the giving of this note had never been ratified or approved by Cole. Whatever presumption, therefore, there might have been in favor of the plaintiff at the outset had been fully overcome, and, if there exists any further fact from which an authority might be implied, the plaintiff must show it, or lose his case.

It is manifest that in the Michigan case, as, indeed, in all the cases treating of the burden of proof in suits on notes alleged to have been executed by partnerships, an illegitimate use has been made of the term "burden of proof." Properly, it is applied only to a party affirming some fact essential to the support of his case. Thus used, it never shifts from side to side during the trial. Loosely used, as in the cases referred to, it is confounded with the weight of evidence, a very different thing, which often shifts from one side to the other as facts and presumptions appear and are overcome; and, in this indiscriminate use of the term "burden of proof," much of the apparent conflict in the cases has its origin. For, after all, the test of the burden of proof is very simple, and so is the question of the weight of evidence, and there is no contrariety in the principle adopted by the authorities. In the light of principle, we think it may be demonstrated that the position of the plaintiff is untenable. A partnership has been sued on a note executed in its name. Upon the trial the note is produced by the plaintiff, and the first question is, was it the note of the firm? The plaintiff takes the affirmative of this issue, because, if no evidence is offered on either side, he must fail. He has then the burden of proof, and it remains on him, and does not pass at all to the defendant. But suppose now it is shown or admitted that the partnership alleged exists, and that one of the firm executed and delivered the note in its name. By virtue of the general presumption that authority was given by the partnership, the plaintiff is entitled to recover, if nothing further appears, because the weight of evidence is on his side. But suppose the defendants take their turn, and prove the identical facts here found—that there was no authority, general or special, given; no ratification of the act; no course of dealing to imply authority; and, furthermore, that the partnership was of a class from which no authority can be implied. Is the plaintiff now entitled to a verdict? Has he proved that the note was the note of the firm? Surely not. What, then, is left on which to rest his case? The preponderance

of evidence is not with him. The burden upon him to show that it was a partnership note has not now been met. But it is said that there is a realm of inquiry not touched by either party; that is, that it was not shown whether or not the partnership had the benefit of the consideration of the note. If such a fact appeared, we concede, for the purposes of this case, that it would tend to show that the note was the note of the firm. But if any authority could not be implied as the case stood before, can it now be implied? The case stands precisely as before. There can be no change in the weight of the evidence, because nothing has been added; and the claim of the plaintiff would seem to be reduced to the absurdity that he is to have the same benefit from an unproved fact as from one proved. There was error in the judgment complained of, and, as against the defendant Cole, it is reversed, and a new trial ordered.

The other Judges concurred, except GRANGER, J., who dissented.

VETSCH v. NEISS et al.

(Supreme Court of Minnesota, 1896. 66 Minn. 459, 69 N. W. 315.)

COLLINS, J. Action upon a promissory note alleged to have been made by defendants, as copartners. The plaintiff was an indorsee after maturity. The answering defendant admitted the existence of a partnership for a specified purpose between the defendants, and then alleged that the note was executed and delivered by his copartner, without his knowledge or consent, and that the sole and only consideration therefor was a private debt due from such partner to the payee named in the note. These were the issues upon which the parties went to trial; and, at the conclusion of the evidence, the court, upon plaintiff's motion, instructed the jury to return a verdict in his favor. Such a verdict was returned, and the appeal is from an order denying a motion for a new trial.

Several assignments of error are urged by counsel, mostly relating to the rulings of the court when receiving testimony; but we pass all of them, and come directly to that which challenges the action of the court when directing a verdict in plaintiff's favor. The evidence showed conclusively that the copartnership carried on the business of boring wells, buying materials for pumps and windmills, putting these materials together, and placing these articles into wells bored by the firm, or already bored or dug by other persons. Strictly speaking, it was not a trading partnership, although it will be seen upon an examination of the decisions that the line of demarkation between what are trading and what are nontrading partnerships is very indefinite and indistinct. In 1 Bates, Partn. § 327, the author states that trading partnerships are frequently called commercial or mercantile partnerships, but that these terms seem to be somewhat too narrow, for

oftentimes mechanical and manufacturing partnerships are included among trading partnerships, the test being founded, not on the nature of the articles they deal in, but the character of their dealings. Mr. Bates points out the difficulty in the application of any test for the purpose of determining with absolute certainty, as a question of law, what are and what are not trading partnerships, and finally concludes that if the partnership contemplates the periodical or continuous or frequent purchasing, not as incidental to an occupation, but for the purpose of selling again the thing purchased, either in its original or manufactured state, it is a trading partnership; otherwise, it is not. This, as a general statement, is undoubtedly correct, but the difficulty lies in its application, as will be seen by an examination of the cases cited in the volume referred to (sections 328 and 329, the last treating particularly of nontrading firms), all of the cases cited being partnerships in occupation; and in some of these cases the difference between trading and nontrading partnerships seems to be ignored, the single test of scope of business being adopted. While, on the authorities, it may not be very difficult, in many cases, to hold, as a matter of law, that the scope of the business carried on by a certain firm renders it a trading partnership, with a power or authority resting in each partner to borrow money for the use of the firm, and to execute and deliver negotiable paper therefor, or to hold, as a matter of law, that the firm business constitutes it nothing but a nontrading partnership, in which the partners have, prima facie, no authority to borrow money, or to bind the concern by a promissory note, there are many partnerships concerning which no rule of law as to the implied powers of the partners with respect to firm notes can be applied with safety. In these cases the authority of either partner in this respect must be determined as a question of fact, depending upon circumstances peculiar to each. Certain it is, from the nature of the business conducted by defendant firm, that the court below could not hold, as a matter of law, that it was a trading partnership, and hence that each partner had implied authority to borrow money for its use, and to execute and deliver a firm note for the same.

The evidence conclusively showed that the note in suit was given for money borrowed to pay a firm debt, incurred for labor performed for the firm, and in its legitimate business, and that the money so obtained was used by the partner who made the note in payment of this indebtedness. But, when the partnership is strictly nontrading, it can make no difference that the money was actually used for its benefit. 1 Bates, Partn. § 313, and citations. The question is one of authority to execute the note, not as to what became of the proceeds, or for whose benefit they were used. But in cases where the court cannot say, as a matter of law, that the firm is either a trading or a nontrading partnership, and that each member has or has not the power to bind the firm by the issuance of negotiable paper, the test seems to be whether the issuing of such paper is essential to carry into effect

the ordinary purpose for which the partnership was formed. Id. And, of course, the fact that the firm derived the benefit of the act may be taken into consideration when applying this test. The liability of one partner upon promissory notes and other contracts made by a copartner, without his actual knowledge or assent, is a question of agency; and the law applicable to the case now before us is concisely stated in Irwin v. Williar, 110 U. S. 499, 4 Sup. Ct. 160, 28 L. Ed. 225, thus: [See this case, ante, p. 363.] See, also, Dowling v. Bank, 145 U. S. 512, 12 Sup. Ct. 928, 36 L. Ed. 795

The court erred in holding, as a matter of law, that, upon any view of the facts, the jury could not find for the defendant who answered. We have not alluded to the testimony introduced by plaintiff which tended to show that the defendant just referred to knew that his partner was to borrow the money from the payee of the note, and to make the note in suit, for such knowledge was denied. It is hardly necessary to say that if the jury found that he was advised that the money was to be borrowed, and the note given, and assented to it, either actually or by implication, a verdict in plaintiff's favor could be sustained on this fact alone. Order reversed, and new trial granted.

KIRK v. BLURTON et al.

(Court of Exchequer, 1841. 9 Mees. & W. 284.)

ALDERSON, B. The court do not entertain any doubt as to the principle of law applicable to this case. One partner can bind his copartners only to the extent of the authority which is given to the partners generally to enable them to carry on the partnership business together. The true principle is that which has been stated by Mr. Cresswell: That in the case of a partnership the authority which each partner has is an authority given by law to do such things as are necessary for carrying on the partnership. If bills are necessary then they have a power to accept bills, and so to bind each other. If there is an express contract amongst themselves, different from that which the law implies, that express contract must prevail. What authority is there in a case like the present? An authority to bind the firm in the name of the partnership, and in that only. In those cases where the question has been left to the jury, it has been whether substantially there was any difference between the signature and the name of the partnership. For instance, if the signature were Coal & Co., and the true designation of the partnership were Cole & Co., it would no doubt be for the jury to say whether it was in substance the same. Upon the whole, I am of opinion that Habershon had no authority to bind Blurton, except in the partnership name, which, upon the evidence, appears to have been "John Blurton," only; and therefore the verdict on the first and second issues must be entered for the defendant.

YORKSHIRE BANKING COMPANY v. BEATSON.

See ante, p. 157, for a report of the case.

HARRISON v. JACKSON et al.

(Court of King's Bench, 1797. 7 Term R. 207.)

This was an action of covenant upon an agreement of three parts, stated in the declaration to have been made on the 10th of July, 1794, between the defendants, describing them as merchants and partners, of the first part, W. and J. Harrison, of the second part, and the plaintiff, of the third part, of one part of which said agreement, as being sealed with the seal of the said W. Sykes for himself and the other two defendants, the plaintiff made a profert in the court. The declaration then stated the agreement and covenant of the defendants, the subject-matter of which agreement and covenant appeared on the agreement to be a partnership transaction on the part of the defendants, and to have been entered into on a full and valuable consideration received by them as partners. The declaration then stated the breach of covenant, whereby the plaintiff had sustained damage to the amount found by the jury.

To this declaration the defendants pleaded that the agreement was not the deed of the defendants. Issue being joined, the cause was tried at the sittings after Hilary Term, 1797, before Lord Kenyon, at Guildhall, when the jury found a verdict for the plaintiff damages £477 13s. 9d. and costs, 40s. subject to the opinion of this court on the following case:

The defendants were partners. The agreement stated in the declaration was produced, and the subscribing witness proved that it was executed in his presence by the defendant Sykes in the following form: "For Jackson, Self, and Rushforth, W. Sykes." But neither Jackson nor Rushforth was present at the execution. The question for the opinion of the court was whether such execution of the agreement by the defendant Sykes was binding on the other defendants, Jackson and Rushforth.

Lord KENYON, C. J. * * * The law of merchants is part of the law of the land; and in mercantile transactions, in drawing and accepting bills of exchange, it never was doubted but that one partner might bind the rest. But the power of binding each other by deed is now for the first time insisted on, except in the nisi prius case cited, the facts of which are not sufficiently disclosed to enable me to judge of its propriety. Then it was said that, if this partnership were constituted by writing under seal, that gave authority to each to bind the others by deed; but I deny that consequence just as positively as the former, for a general partnership agreement, though under seal, does not authorize

the partners to execute deeds for each other, unless a particular power be given for that purpose. This would be a most alarming doctrine to hold out to the mercantile world. If one partner could bind the others by such a deed as the present, it would extend to the case of mortgages, and would enable a partner to give to a favorite creditor a real lien on the estates of the other partners.

PER CURIAM. Postea to the defendants.

McDONALD et al. v. EGGLESTON et al.

(Supreme Court of Vermont, 1853. 26 Vt. 154, 60 Am. Dec. 303.)

ISHAM, J. This action is in covenant. The questions in the case arise under the plea of non est factum, which puts in issue the execution of the instrument on which the action is brought. The agreement was signed and sealed, in the name of Eggleston, Barker & Co., by B. Barker, one of the firm. It is insisted that he had no authority as a partner to execute the instrument in that manner; that it is not binding on those partners, who were absent at the time, and who had not previously assented to its execution; and that no testimony was introduced, tending to show a subsequent ratification of its execution, by the absent members of the firm, sufficient to render it their deed.

We learn from the case that the defendants were the persons composing the firm of Eggleston, Barker & Co., and that in the fall of 1845 they contracted with Mr. Belknap to construct the Vermont Central Railroad from the mouth of Dog river to Lake Champlain. The first and second sections of the road were afterwards sublet by the defendants to the plaintiffs for construction. It is obvious, therefore, that the subject-matter of this agreement, on the part of the defendants, was within the scope of their partnership business, and that this agreement was made to carry into effect the object for which their relation as partners was formed, and to insure, to that extent, the performance of that contract, which they were under obligations with Mr. Belknap to execute. It is unquestionably necessary for the plaintiffs to show those facts, which will render this instrument the deed of all the defendants; otherwise, this joint action of covenant cannot be sustained.

At common law one partner could not charge the firm, by deed, with a debt or other obligation, even in commercial dealings, without a prior authority, under seal, for that purpose. Neither could such an instrument be subsequently ratified, so as to make it the deed of the company, except by an instrument, under seal. Harrison v. Jackson, 7 Term R. 207; Holt, N. P. C. 141; Smith's Mer. Law 68; 1 Amer. Lead. Cas. 446, note. The reason for this rule is founded on principles of English law, which do not exist in this state; that such a power would enable one partner to give a favorite creditor a lien on

the real estate of the partners, and, consequently, a preference over the simple contract creditors of the firm. Though this reason for that rule does not exist in this state, the general principle has been and is recognized and sustained. The strictness of this rule, however, has been greatly relaxed, to suit the exigencies of partnerships and commercial associations, and by later authorities in England and in this country instruments under seal may be executed for many purposes by one partner which will be binding on the firm. Thus one partner may release, under seal, an obligation or debt due the firm (McBride v. Hagan, 1 Wend. [N. Y.] 326; Morse v. Bellows, 7 N. H. 550, 28 Am. Dec. 372), or execute a power of attorney, under seal, to another, for that purpose (Wells v. Evans, 20 Wend. [N. Y.] 251; s. c., 22 Wend. [N. Y.] 325). It has been held "that when a seal is not essential to the nature of the contract, and will not change or vary the liability, the addition of a seal will not vitiate it; and when an act is done, which one partner may do without deed, it is not less effectual that it is done by deed." On this subject Justice Story has remarked (Story on Part. § 122), "that in cases where the contract would have been binding, if made without a deed, there does not seem to be any solid reason why the act, when done, should be vitiated by being under the signature and seal of the firm." That this agreement would have been obligatory if it had been executed as a simple contract, and not under seal, there can be no doubt, for it was made to advance their partnership interests, and in the benefits derived from it they have participated.

We think, however, that principle does not apply to a case of this character. The doctrine seems to be established that an instrument executed in that manner, in the absence of other partners, will be binding on the firm only in transactions that transfer an interest. Thus in Milton v. Mosher, 7 Metc. (Mass.) 244, it was held that a mortgage of personal property need not be under seal, and that a mortgage of that character is not vitiated by one partner affixing a seal to the instrument. The same principle is sustained in Tapley v. Butterfield, 1 Metc. (Mass.) 515, 35 Am. Dec. 374; Lucas v. Bank, 2 Stew. (Ala.) 280; 1 Amer. Lead. Cas. 447, and cases cited. The rule, however, is of long standing, and fully sustained by the authorities, that a mere partnership relation will not authorize one partner to execute an instrument under seal, whereby a new and original obligation is created which will be binding on the company as a specialty debt, or which can be enforced by the action of covenant. If the case, therefore, is made to rest on the circumstances which took place at the time the instrument was signed by B. Barker, we do not see how it can be sustained as the deed of all the defendants. We have no doubt, however, that an instrument of this character, executed in this manner, may be rendered obligatory by a previous parol authority, or by a subsequent parol ratification, and in either event the instrument will become the deed of the company, and that much slighter acts will produce that

effect, where the subject-matter of the agreement is within their partnership dealings, than it will where it has no connection with the business of the firm, and from which they are to derive no benefit. In the case of Ball v. Dunsterville, 4 Term R. 313, it was held that if the partners were all present, when one of their number signed the instrument in the partnership name and affixed thereto a seal, it became the deed of all. The authority for the execution of that deed was not under seal, but rested in parol; that is, parol testimony was admitted to prove the presence of the partners at the time of its execution, and that circumstance was treated, not only as an adoption of the signature, but of the seal, so as to render it the deed of the firm, upon which covenant was sustained. If parol testimony is admissible to prove an authority from that source, it is equally so to prove other circumstances showing their assent to such an execution of the instrument. The actual presence of all the partners may, perhaps, afford more satisfactory evidence of their assent than other circumstances which may exist; but that affects simply the credibility of the testimony, not its competency. If parol testimony is admissible in one case, it is in the other. If a power of attorney under seal can be dispensed with in one instance, it may in the other, also. This view of the subject is taken by Wilde, J., in Cady v. Shepherd, 11 Pick. (Mass.) 405, 22 Am. Dec. 379, in which he remarks "that in the case of Ball v. Dunsterville importance was attached to the circumstance that both partners were present when the deed was executed; and it may be important, as being the most satisfactory proof of the assent of the nonsubscribing partner, but in no other respect does it appear to be material."

If a previous authority, resting in parol, will render the instrument binding on the firm, as a deed, it follows that a subsequent ratification of the instrument may be proved by circumstances resting in parol; for no greater authority is requisite to ratify an instrument than is required to execute it. The power that can create can legally ratify. This conclusion has been drawn and sustained wherever the case of Ball v. Dunsterville has been recognized and adopted, particularly by the courts in this country. Chancellor Kent (3 Kent's Com. 51) has reviewed the cases on this subject both in England and this country, and he observes "that an absent partner may be bound by a deed executed on behalf of the firm by his copartner, provided there be either a previous parol authority or a subsequent parol adoption of the act, and that such ratification amounts in judgment of law to an execution of the deed by all the partners, though executed by one only." The ratification does not make a verbal or simple contract merely, for it is an adoption by the party of the signature and seal affixed to the name of the firm. In Collyer's Treatise on Partnerships, § 467, it is said "that the American cases have gone farther than those in England in relaxing the former strictness of the law, and that it is well settled in the United States that an absent partner may be bound by a

deed executed on behalf of a firm by his copartner, provided there be either a parol authority, or a subsequent parol adoption of the act." The rule is also sustained in 1 Amer. Lead. Cas. 446, in which it is remarked "that it is settled, after thorough investigation of the cases, that a partner may bind his copartner by an agreement under seal in the name of the firm, provided the copartner assents to the contract previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol, and need not be express and special, but may be implied from the conduct of the other partner or the course of dealing by the firm." Swan v. Stedman, 4 Metc. (Mass.) 548; Bond v. Aitkin, 6 Watts & S. (Pa.) 165, 40 Am. Dec. 550; Pike v. Bacon, 21 Me. 280, 38 Am. Dec. 259; Darst v. Roth, 4 Wash. C. C. (U. S.) 471, Fed. Cas. No. 3,582; Anderson v. Tompkins, 1 Brock. (U. S.) 462, Fed Cas. No. 365, by Marshall, C. J. We are satisfied that parol evidence is admissible to prove that this instrument is the deed of the defendants, and became such by the signature of the partner in the name of the firm, by showing a previous authority for that purpose resting in parol, or that they were present at the time, or subsequently ratified the same, either expressly or impliedly, and that this implication may be drawn from the conduct of the partners or the course of dealing by the firm.

The court directed a verdict for the defendants, thereby treating the evidence introduced as having no tendency to show a subsequent ratification of the instrument, and as being incompetent to be taken into consideration by the jury. In relation to H. V. B. Barker and Mr. Haight, both of whom, it appears from the case, were about the house, at the time the instrument was executed, and who came there for that purpose, there can be no doubt that those circumstances should go to the jury as evidence of their assent to its execution. As to them, the case in its facts seems to fall within that of Ball v. Dunsterville. In relation to Mr. Eggleston, the remaining partner, more difficulty exists. It does not appear that he had ever been in that vicinity previous to July, 1846, about two months after this instrument was executed. In consequence of some difficulties in the affairs of the company, he was sent for, and came to the office of the company at Montpelier on that account. On that occasion he was led to the examination of the affairs of the company and its liabilities and resources, to the examination of the money which was received from Mr. Belknap under their contract, and to its expenditure by them in the construction of the road. As these plaintiffs were then employed in constructing their part of the road, and naturally would be entitled to the amount due them on the monthly estimates, it is not unreasonable to conclude that Mr. Eggleston, in seeing to the expenditures of the company, became informed of the contract made with the plaintiffs for the construction of those sections of the road. The duplicate of this instrument was among the papers in the office. After that examination they went to Burlington, on the line of the road, and on the sections where the

plaintiffs were at work. A statement of the affairs of the company was sent to him by mail, soon after his return to Albany, and the legal presumption is that it was received. It is true that all this may exist, and he not know that this contract was executed by deed; yet they are consistent with his examination of that agreement and his knowledge of its provisions. The question now is, not whether the testimony is sufficient, but whether those circumstances have a tendency to show such knowledge, and that no objections were made to its execution in that form. Of this the jury are to judge, and draw their conclusions. If those circumstances have such a tendency, they should not have been taken from the consideration of the jury. We think plaintiffs were entitled to have that testimony submitted to the jury, as having a legal tendency in proof of the issue formed in the case.

The judgment of the county court must be reversed, and the case remanded.

EDWARDS v. DILLON.

(Supreme Court of Illinois, 1893. 147 Ill. 14, 35 N. E. 135, 37 Am. St. Rep. 199.)

MAGRUDER, J. This is an action of assumpsit brought by the appellant against the appellee upon the following sealed instrument: "This is to certify that Levi Dillon & Sons have this day sold to *B. Edwards, of Chicago, Ill.*, the *imported Norman stallion Cambrone*, for the sum of *eighteen hundred dollars*. We warrant the said *stallion* sound and healthy, but assume no responsibility on account of disease or accident after this date. We guaranty that the said stallion, with proper handling, shall prove to be an average foal getter. In case the said stallion shall fail to get colts, we agree to exchange him for a stallion of equal merits, and to pay half of the expense incurred in making said exchange. Said stallion shall have a fair trial of two years before being condemned as a breeder. *Cambrone was foaled in France in 1880, and imported to the United States by Dillon Bros. in 1883. Cambrone is recorded in the National Register of Norman Horses, No. 2,081.* In witness whereof, we have hereunto set our hands and seal this *thirtieth* day of January, 1884. Levi Dillon & Sons. [Seal.]" All of the foregoing instrument was a part of the printed form hereinafter referred to, except the signature to said instrument, and those words thereof which are italicized. The declaration avers breaches of warranty and guaranty set forth in the certificate. The defendant, Levi Dillon, pleaded in abatement the nonjoinder of his four partners, setting up that the alleged promises, if any, were made by the firm of "Levi Dillon & Sons," composed of Levi Dillon, John Harding, James Railsback, Ellis Dillon, and James C. Duncan, and that the horse in question, at the time of the sale, was

the property of the firm, and not of Levi Dillon alone. The plaintiff did not amend his declaration by making new parties, but filed his replication joining an issue of fact on the plea. In the circuit court there was a trial by jury, and verdict and judgment were in favor of the defendant, which judgment has been affirmed by the appellate court.

It is admitted that the signature to the contract, "Levi Dillon & Sons," was made by Levi Dillon alone. The issue tried below was whether or not the contract was the contract of Levi Dillon & Sons, or of Levi Dillon alone. The jury found it to be the contract of the firm, and the judgment of the appellate court is conclusive of the question of fact. But it is urged by appellant that the court erred in allowing the defendant to introduce, over plaintiff's objection, oral proof of the partnership, upon the alleged ground that the contract sued on was under seal, and that Levi Dillon had no power to sign a sealed instrument for the firm, and that, therefore, under the law, the signature was that of Levi Dillon alone, and that he alone was liable. The same question presented by the objections to evidence arises upon the instructions. It is assigned as error that the court refused to instruct the jury, at plaintiff's request, that, "in order to bind the partners by signing and sealing the contract in question in the firm name of Levi Dillon & Sons, the defendant must have had express authority from each one of his partners to execute the contract under seal."

At common law, one partner could not bind the others by an instrument under seal, unless they gave him express authority under their seals. In harmony with this rule, it has been held that where one partner executes an instrument under seal, in the firm name, without authority under seal, he alone is bound by it. Story, Partn. (7th Ed.) §§ 117, 119; 1 Bates, Partn. § 421. The general weight of authority is undoubtedly in favor of the position that one partner has no implied power to bind the firm by instrument under seal. 17 Amer. & Eng. Enc. Law, p. 1001, and cases in notes. But the American courts have been inclined to depart from the harshness of the common-law rule. They hold to the doctrine that, where one partner executes an instrument under seal in the name of the firm, it will be regarded as binding upon the firm, "where an express or an implied authority or confirmation could be justly established, not under seal, whether it be verbal or in writing or circumstantial." Story, Partn. (7th Ed.) §§ 121, 122. The prior assent or subsequent ratification may not only be by parol, but may be implied from declarations, or from acts and circumstances. 1 Bates, Partn. § 416; Pars. Partn. marg. p. 181, and notes; Gram v. Seton, 1 Hall (N. Y.) 293; Cady v. Shepherd, 11 Pick. (Mass.) 400, 22 Am. Dec. 379, 17 Amer. & Eng. Enc. Law, p. 1002, and cases in note 4. In Eames v. Preston, 20 Ill. 389, the question was whether the action of assumpsit could be maintained upon a certain note therein set forth, which was executed by a firm. Inasmuch as the note was held to be under the seal either of the firm or of the partner signing

it, it followed that suit in assumpsit would not lie upon it, under the statute as it then existed. The material inquiry in that case was, not so much whether one partner had authority to execute an instrument under seal in the name of the firm, as whether the instrument there under consideration was or was not a sealed instrument. Under section 19 of the present practice act, assumpsit may be maintained upon sealed instruments. That section has abolished the distinction between sealed and unsealed instruments, as to the form of action. Harms v. McCormick, 132 Ill. 104, 22 N. E. 511. In Peine v. Weber, 47 Ill. 41, we said: "We think it may be safely said the modern rule is that one partner may, in furtherance of the partnership business, and for its benefit, execute a deed under seal, which will be binding on the other, if he has foreknowledge, or subsequently ratifies it, and this may be proved by acts and circumstances, or by his verbal declarations and admissions." Under the American doctrine the liability of the partners will not be confined to the one who signs the sealed instrument in the name of the firm, if it appears that the prior assent or subsequent ratification of the other partners can be implied from their acts and declarations, or from other proper evidence tending to show such assent or ratification. Wilcox v. Dodge, 12 Ill. App. 517; Walsh v. Lennon, 98 Ill. 27, 38 Am. Rep. 75. There is evidence in the present record tending to show that the act of Levi Dillon in signing the firm name of "Levi Dillon & Sons" to the instrument sued upon in this case was done with the previous assent of the other partners. The firm was engaged in the business of importing and selling Norman horses. They prepared a bound book, containing blank forms of certificates of sale, with warranties, of which the foregoing certificate, except the signature and the italicized words, is a sample. These certificates, with their warranties, were intended to be those of the firm, because the name of the firm is printed in the body of them, and were intended to be under seal, because each has, to the right of the signature line, a scroll with the word "Seal" printed in it. The firm adopted and used this blank form, giving therein written guaranties. All the members knew of the form. The firm gave 50 or 75 certificates drawn according to this form, with the seal attached. When a sale was made, one copy would be kept, and a duplicate would be given to the purchaser. All the members of the firm had access to the bound book of forms. The other members, as well as appellee, would fill up the certificates, and write the guaranties in them when horses were sold, and sign the firm name thereto, opposite the seal, though the business was generally transacted by appellee.

But, even if it were true that the evidence does not show acts and circumstances from which the assent of the other partners may be implied, we do not think that the instrument here sued upon was necessarily one which was required to be under seal. While one partner cannot bind his copartners by deed, yet, if the instrument executed by him, though under seal, would have been valid without a seal, and

within the scope of the partnership business, and within the powers belonging to each partner, then the seal may be disregarded, and the instrument may be ratified as a simple contract. Walsh v. Lennon, supra; Mechem, Ag. § 141; Story, Partn. (7th Ed.) § 122; Sterling v. Bock, 40 Minn. 11, 41 N. W. 236; Human v. Cuniffe, 32 Mo. 316; Robinson v. Crowder, 4 McCord (S. C.) 519, 17 Am. Dec. 762; Deckard v. Case, 5 Watts (Pa.) 22, 30 Am. Dec. 287. In other words, "the mere addition of a seal to a contract within the ordinary scope of the business, which requires none, does not vitiate the contract." 17 Amer. & Eng. Enc. Law, p. 1004, and cases in note 1. This doctrine is conceded to be applicable to the instrument upon which the present suit is brought, so far as that instrument is a mere bill of sale. Where there is a simple transfer of property, the addition of a seal neither adds to nor detracts from the effect of the transfer; and consequently, if it is signed and sealed in the firm name by one partner, it is not thereby rendered inadmissible in evidence against the other partners. But it is said that the addition of the seal to the firm name by the signing partner makes the instrument inadmissible against the other partners, so far as the warranties or guaranties contained in it are concerned. There are some authorities which hold that an unnecessary seal may be disregarded in instruments of transfer, but not in those creating a new and original obligation, in the nature of a specialty debt. 1 Bates, Partn. § 418, note 2. But where the obligations contained in a bill of sale of personal property, as well as the transfer of the interest in the property itself, are within the ordinary scope of the partnership business, and within the powers of each individual partner, the non-executing partners are not relieved from liability upon such obligations by the mere fact that the partner signing the firm name affixes a seal. The firm of Levi Dillon & Sons were dealing in Norman stallions. Each partner had the power to sell these stallions, and there was involved in such power of sale the further power to warrant the quality of the horse, as to its fitness for the purpose for which it was sold. Partners are considered as sanctioning the contracts which they singly enter into in the course of trade. By the act of entering into the partnership, each partner is made the general agent of his copartners as to the firm business. Deckard v. Case, 5 Watts (Pa.) 22, 30 Am. Dec. 287. Where a general agent is employed to carry on business, the authority to sell, which is conferred upon him, may carry along with it the power to warrant, if it is usual, as it was here, to give a warranty when making a sale in such business. Brady v. Todd, 9 C. B. (N. S.) 592; Bid. War. §§ 14, 15. A general agent employed to carry on the business of horse dealing for his employer has an implied authority to warrant soundness, when making sale of a horse. 2 Benj. Sales, marg. pp. 618–620, §§ 830, 831. Where a dealer contracts to supply an article in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment of the dealer, there is an implied warranty that it is fit for

the purpose to which it is to be applied. Jones v. Just, L. R. 3 Q. B. 197; Bid. War. § 167.

For the reasons here stated, we are of the opinion that the circuit court committed no error in refusing the instructions refused, or in admitting the evidence objected to. The judgment of the appellate court is accordingly affirmed.[1]

SECTION 4.—POWERS OF MAJORITY.

JOHNSTON et al. v. DUTTON.

(Supreme Court of Alabama, 1855. 27 Ala. 245.)

GOLDTHWAITE, J. The evidence in this case tended to show that the appellants and one Vanderslice carried on in copartnership a steam sawmill, which by the articles of copartnership was to continue at least five years; that the note sued on was given with the concurrence of two of the partners, Fogg and Vanderslice, for supplies necessary for the hands engaged in carrying on the mill, which had been ordered by one of them. Upon these facts alone there can be no doubt that the firm would be bound. The furnishing of supplies to those engaged in the immediate direction of the business was essential to the conducting of it, and within the scope of the purpose for which the individuals had associated; and the authority of either of the partners to purchase such supplies, and give the note of the firm, cannot be questioned.

The principal ground of objection, however, is that the evidence proved that, before the goods were furnished and the note given, the appellant Johnston gave notice to the public that he would not be responsible for any future debt contracted on account of the copartnership, and that this notice was brought home to the party with whom the debt was contracted; and it is insisted that its effect was to revoke the authority of the other partners, so far as he was concerned, to bind the firm from that time.

It is to be observed that in the present case the contract was concurred in by two members of the firm; and the question, therefore, is as to the right of the majority to bind the other partners, against their dissent, as to matters appertaining to the common business, and in the absence of any stipulation conferring that power in the articles of copartnership. This question is a new one in this court, and, indeed, we

[1] As to the liability of the firm by reason of negotiable paper or sealed instruments executed in the name of one partner, but for the use and benefit of the firm, see the cases in chapter IV, section 3, ante.

have found no case in which it has been expressly decided. Both in England and the United States there are cases which assert the general proposition that a partner may protect himself against the consequences of a future contract, by giving notice of his dissent to the party with whom it is about to be made. Gallway v. Matthew, 10 East, 264; Willis v. Dyson, 1 Stark. 164; Vice v. Fleming, 1 Y. & Jerv. 227, 230; Leavitt v. Peck, 3 Conn. 125, 8 Am. Dec. 157; Feigley v. Sponeberger, 5 Watts & S. (Pa.) 564; Monroe v. Connor, 15 Me. 178, 32 Am. Dec. 148. And where the firm consists of but two persons, and there is nothing in the articles to prevent each from having an equal voice in the direction and control of the common business, the correctness of the proposition cannot be questioned. In such case the duty of each partner would require him not to enter into any contract from which the other in good faith dissented; and, if he did, it would be a violation of the obligations which were imposed by the nature of the partnership. It would not, in fact, be the contract of the firm; and the party with whom it was made, having notice, could not enforce it as such. So, if the firm was composed of more than two persons, and one of them dissented, the party with whom the contract is made acts at his peril, and cannot hold the dissenting partner liable, unless his liability results from the articles or from the nature of the partnership contract. All the cases can be sustained on this principle; and it is in strict analogy with the civil law, which holds, where the stipulations of the partnership expressly intrust the direction and control of the business to one of the partners, that the dissent of the other would not avail, if the contract was made in good faith. Pothier, Traite du Com. de Soc. Nos. 71, 90. And such, also, we think, is the rule of the common law. Const v. Harris, Turn & Russ. 496; Story on Part. § 121. Were it otherwise it would be denying to parties the right to make their own contracts. If our views as to the governing force of express stipulations are correct, the effect of such terms or conditions as result by clear implication from the articles, or arise out of the nature of the partnership, must be the same. It is as if they had been expressly provided.

Now, whenever a partnership is formed by more than two persons, we think that in the absence of any express provision to the contrary there is always an implied understanding that the acts of the majority are to prevail over those of the minority as to all matters within the scope of the common business; and such we understand to be the doctrine asserted by Lord Eldon in Const v. Harris, supra, and such was the opinion of Judge Story. Story on Part. § 123; 3 Kent's Com. (5th Ed.) 45. The rule as thus laid down is certainly more reasonable and just than to allow the minority to stop the operations of the concern against the views of the majority. We do not say that it would be a bona fide transaction, so as to bind the firm, if the majority choose wantonly to act without information to or consultation with the minority. Story on Part. § 123. But when, as in the present case, the

one partner has given notice, and expressed his dissent in advance, there could be no reason or propriety in requiring him to be consulted by the other two.

We do not consider the cases to which we have been referred, holding that one partner has the right at pleasure to dissolve a partnership, although the articles provide that it is to continue for a specified term (Marquand v. Mfg. Co., 17 Johns. [N. Y.] 525; Skinner v. Dayton, 19 Johns. [N. Y.] 513, 10 Am. Dec. 286), as having any bearing on the case under consideration. Conceding they are law—which is doubtful (Story on Partn. § 275, note 3, and cases there cited)—the decision rests solely upon the ground that the limitation on the right of dissolution is incompatible with the nature of the copartnership contract; and this principle does not militate against the position we have asserted. The dissent, in the present case, cannot be regarded as a dissolution; for, if effectual, it would not necessarily produce that result, although it might operate to change the mode of conducting the business. In other words, it might be carried on without contracting debts.

Our conclusion is that the act, being concurred in by two of the partners, was, under the circumstances, the act of the firm, and that the charge, asserting the proposition that the dissent of one partner against the other two would necessarily exonerate him, was properly refused.

Judgment affirmed.

MONROE v. CONNER et al.

(Supreme Judicial Court of Maine, 1838. 15 Me. 178, 32 Am. Dec. 148.)

Assumpsit against James Conner and William Coleman. Conner lived at Gardiner, and owned a carding and fulling mill at Unity. The business of carding wool and dressing cloth was carried on at that mill by Coleman, and the articles charged were furnished by the plaintiff and delivered at the mill. The plaintiff claimed to recover against both, on the ground that Conner and Coleman were partners in the business carried on at that mill. No articles of copartnership were produced or proved to have been made, and the plaintiff relied on other evidence tending to prove the partnership. Conner denied the partnership, and offered evidence tending to prove that he had given notice to the plaintiff that he would not be holden on any contracts made by Coleman. The counsel for Conner requested the judge to instruct the jury that if Conner notified the plaintiff's agent, who delivered all the articles, before the delivery, that he, Conner, would not be holden for anything unless delivered by his order, then Conner is not holden for anything delivered to Coleman after such notice. The judge did not give this instruction, but did instruct them that if, from the evidence in the case, they were satisfied that the defendants were copartners, such notice would not discharge Conner

from further liabilities, unless he should show them that by the conditions of the copartnership such power was reserved to Conner. At the request of Conner's counsel the jury were directed to find whether such notice was or was not given. The jury found a verdict for the plaintiff, and also found that such notice had been given. Conner filed exceptions.

SHEPLEY, J. The question presented in this bill of exceptions is one of no inconsiderable importance in a mercantile community, and there is found to be some difference of opinion respecting it. The general rule is that the contract of one partner binds all in transactions relating to the partnership, and this rule prevails when the partner making the contract applies the fruits of it to his own private use, if the contract is made in the usual course of business, and the appropriation be unknown to the other party to the contract. So one partner can make purchases, and can sell, pledge, and assign the partnership goods, and in these acts bind all the partners.

When a partnership becomes known, and its course of dealing has been established, all are at liberty to regard one as acting for the benefit of all the partners in this accustomed course of dealing. If it were not so, there could be no safety in commercial contracts of this character. But the right of one partner to bind all rests upon the principle that all have agreed that he should do so.

This agreement is either expressed, or implied by law from the nature of the association or from the customary course of dealing. There is nothing inconsistent with this rule in allowing one of the partners to dissolve the contract of partnership, giving due notice that such power to bind him has ceased to exist. This he may, without doubt, do where there is no special agreement that the partnership shall continue for a definite period, which is yet unexpired. Whether one partner may dissolve the partnership before the agreed time expires may admit of doubt. Upon principle, however, it would seem that it was only for the other party to that contract to complain; it being of no importance to others whether they violate contracts between themselves, if full notice is given, so that others may understand to whom they are to give credit. Kent evidently inclines to the opinion that the dissolution may take place. 3 Com. 54. And such is the law in New York (Marquand v. Mfg. Co., 17 Johns. 525; Skinner v. Dayton, 19 Johns. 538, 10 Am. Dec. 286); while the law would appear to be different in England (16 Ves. 56; 1 Swanst. 495). It does not, however, become necessary to express any opinion upon this point, as there is no proof in the present case that the partnership was formed for any definite period. In such cases it is admitted that one partner may by notice dissolve, and thus prevent those having such notice from making further contracts to bind the partnership. If such a power exist as to all persons, it would be difficult to deny that one partner could protect himself against a particular contract by actual notice that he dissented from it before it was concluded. Such a notice re-

moves the foundation upon which the right rests to charge all the partners upon the contract of one. It leaves no longer the presumption that one acts for all, by the consent of all. And if, after such actual notice, a person will give credit, he cannot reasonably complain that he cannot obtain payment from him who has notified him not to give the credit. The only difficulty arises in relieving the partner giving such notice from the payment when the fruits of the contract have been enjoyed by the partnership, of which he still continues to be a member. In Willis v. Dyson, 1 Stark. 164, Lord Ellenborough held that "it would be necessary for the party sending goods after such notice to prove some act of adoption by the partner who gave the notice, or that he had derived some benefit from the goods." Gow, Part. 69, states that, "to recover in an action for goods sold after such countermand, he must show that the sale was adopted by the dissentient partner, or that he had derived a benefit from the delivery." Kent (volume 3, p. 45) remarks "that the seller must show a subsequent assent of the other partners, or that the goods came to the use of the firm." Both these jurists refer to the case of Willis v. Dyson as authority. It is quite obvious that here may be a difference between the goods coming to the use of the firm and a benefit derived to the dissenting partner from their delivery to the firm. The bargain may have proved to be a very losing one, and this may have been foreseen by the dissenting partner, and have been the very cause of the notice; and why should he be held to pay, perhaps from his private property, for goods the purchase and sale of which may have absorbed the whole partnership stock, when he had provided against such calamity by expressing his dissent from the contract before it was consummated?

In the case of Galway v. Matthew et al., 10 East, 264, one partner, after the other partner had given notice of his dissent, signed a note with the name of the partnership, and received the money and applied most of it to the payment of the partnership debts; and the decision was against the right to charge the dissenting partner.

In the case of Leavett v. Peck, 3 Conn. 124, 8 Am. Dec. 157, the fruits of the contract went to the partnership, and yet the dissenting partner was held not to be liable.

Gow states that in negotiable instruments one partner cannot bind another who dissents and gives notice of it, and alludes to no qualification, where the fruits of the contract are applied to the use of the partnership. Gow, 65. Collyer, 214, says: "It seems, also, that the mere disclaimer by one partner of the future contracts of his copartner will be binding on third persons, whatever be the effect of such an act between themselves, or whether it be or be not in conformity to the partnership agreement." He afterwards also states the case of Willis v. Dyson in the language of the court. Kent, after making the remark before stated, examines the cases, and as the result of it says: "It seems, also, to be the better opinion that it is in the power of any

one partner to interfere and arrest the firm from the obligation of an inchoate purchase, which is deemed injurious." This he could not do if he were bound by the goods coming to the use of the firm. It appears to be more in accordance with the general principles of law, and with good faith and fair dealing, to hold that a partner is not bound by a contract after he has given notice to the party proposing to make it that he would not be bound by it.[1]

Exceptions sustained, and new trial granted.

SECTION 5.—POWER TO SUBJECT PARTNERSHIP TO TORT LIABILITY.

HANEY MANUFACTURING COMPANY v. PERKINS.

(Supreme Court of Michigan, 1889. 78 Mich. 1, 43 N. W. 1073.)

LONG, J. This action was brought by the plaintiff, a manufacturing corporation, to recover damages alleged to have been caused by reason of the publication, oral, written, and printed, of the statement that the defendants had brought suit in the United States court against the plaintiff for an infringement of a patent, and had secured an injunction against it, and closed it up, which statements were claimed to be false and malicious. * * *

At the close of the trial in the circuit court the court directed the jury to return a verdict in favor of the defendants, on the ground that the testimony offered by the plaintiff did not entitle it to recover. * * *

Some contention is made that the defendants could not be made jointly liable for these slanders upon the business of the plaintiffs, even if one or two of the partners may have been found guilty. The defendants were partners in business, and each of the partners is an agent of the partnership as an entirety, and, if in the course of that business he injures the business of another by slander, the partnership is liable therefor, just as it might be for any other tort by any other agent. Patten v. Gurney, 17 Mass. 182, 9 Am. Dec. 141; Lothrop v. Adams, 133 Mass. 471, 43 Am. Rep. 528; Atlantic Glass Co. v. Paulk, 83 Ala. 404, 3 South. 800. In the present case it is claimed that the very purpose of these statements was to aid the business of the defendants as a partnership, by preventing plaintiff from making sales of an article which the defendants were themselves as a partnership selling.

[1] In Wipperman v. Stacy, 80 Wis. 345, 50 N. W. 336 (1891), the dissenting partner was held liable on the ground of ratification.

If this fact is proven, then, in the course of the partnership business, if any one of the partners made false representations as to the business of another, and for the purpose of aiding the business of his own firm, the partnership must be held responsible for it.

For the errors pointed out, the judgment of the court below must be reversed, with costs, and a new trial ordered.

WOLF et al. v. MILLS.

(Supreme Court of Illinois, 1870. 56 Ill. 360.)

THORNTON, J. The appellee brought an action on the case, alleging that appellants sold him a lot of sheep pelts, having on them a large quantity of wool, and, with intent to defraud him, delivered other and inferior pelts in quality, and deficient in the quantity of wool. Appellee recovered a verdict.

Wolf & Haber jointly owned the pelts at the time of the sale. The proof is satisfactory that the pelts sold averaged about five pounds of wool per pelt, and the pelts delivered only three pounds. As to the alleged fraud, the evidence is conflicting. One witness testified positively that he saw young Haber, a son of appellant, change the pelts, and that he placed light in place of the heavy pelts, soon after the sale. This was contradicted by the son; but the weight of evidence has been determined by a jury, and we shall not disturb the finding, unless some principle of law has been violated.

Appellants urge that, as there is no evidence to prove the change, if made, was by the direction of Wolf, or by any person in his employment or under his control, therefore he is not liable. The evidence does show that Wolf and Haber were partners in the buying and selling of the sheep pelts, and that young Haber was handling them, and throwing them from one pile to the other. The jury was justified in the inference that this was in the scope of the partnership business, as it was connected with the joint property. It is improbable that the son would be thus engaged, unless directed. The father must have given him some instructions in regard to the exchange.

There was, then, no error in the following instruction given for appellee: "If the jury believe from the evidence that the defendants sold the plaintiff a certain lot of sheep pelts at an agreed price, and that plaintiff has paid such price, and that the defendants afterward, either in person, by their agents, servants, or employés, delivered to plaintiff a lot of sheep pelts in any respect different from and inferior to those actually sold, intending thereby to have the plaintiff believe they were the same he had purchased, and intending to deceive and defraud the plaintiff, then the jury are instructed to find defendants guilty, and to assess as damages whatever loss the evidence may show the plaintiff sustained through such fraud and deceit."

A tortious act of one partner will often create a liability against the firm. So a fraud committed by one partner in the course of the partnership business binds the firm, even though the other partners have no knowledge of, or participation in, the fraud. The jury might reasonably infer all that was necessary to fix the liability of the firm. Judgment affirmed.

DAVIES v. HARVEY.

(Court of Queen's Bench, 1874. Law Rep. 9 Q. B. 433.)

The information charged that the appellant, being one of the guardians of the poor for the parish of Neath, in the Neath Union, and a person concerned in the administration of the laws for the relief of the poor, did furnish or cause to be furnished for his own profit or on his own account goods and materials, to wit, an iron bedstead, ordered to be given in parochial relief to a certain poor person in the said union of Neath, contrary to St. 4 & 5 Wm. IV, c. 76, § 77.

[The appellant was a guardian of the poor, and was also a cabinet maker, and carried on business with his son under the firm name of Davies & Son. The bedstead was purchased from the son, J. F. Davies, and delivered by him. On a case stated, one of the questions for the opinion of the court was whether the furnishing of the goods in question by J. F. Davies was a furnishing by the appellant (Davies) within the meaning of the statute.]

Lush, J. With regard to the latter part of the case I think the facts bring it precisely within the words of the section. The relieving officer ordered at the shop of the appellant and his partner an iron bedstead to be sent to the pauper, and it was supplied by the partner and sent to the pauper's house; he knowing at the time that it was sent in pursuance of an order for parochial relief. The word "given" cannot be construed, in section 77, in its strict literal sense. It must be construed as being supplied gratuitously, whether as an absolute gift, or not in the way of parochial relief. I think the case comes within the very words of the enactment. The material question, no doubt, is whether the appellant is liable; he not personally knowing, at the time of the supplying of this bedstead, that it was to be given in parochial relief. From the words of the enactment I am of opinion that he is a person within the very scope and object of section 77. The section does not make the supplying of goods a crime, but prohibits it by a penalty. The intention is to prevent persons who hold offices concerned in the administration of the laws for the relief of the poor dealing for profit with the parish. The bedstead was supplied with the knowledge of the appellant's partner, under a general authority given by the appellant, for the benefit of the appellant and the partner, and it was supplied by way of parochial relief. The goods are supplied in that sense by the appellant, though actually supplied

by his partner. He shares the profit, and it is supplied on his account. I think it is strictly within the words, as well as the obvious intention, of the enactment. Were it otherwise, it would make a very wide way for evasions of this very salutary enactment.

Judgment for the respondent.

HARMAN v. JOHNSON.

(Court of Queen's Bench, 1853. 2 El. & Bl. 61.)

The first count of the declaration stated that defendant, on, etc., by his promissory note now overdue, promised to pay to plaintiff £1,670, and interest, at 5 per cent. per annum, two years after date, but did not pay the same. The second count stated that "plaintiff retained and employed defendant, and his partner William Henry Smith, then carrying on their business of attorneys and solicitors in copartnership, to invest certain money on mortgage in a proper manner, and they accepted such retainer and employment, and accordingly took that money from the plaintiff to invest a mortgage in a proper manner; but, though a reasonable time for so investing it had elapsed before this suit, it has never been invested, whereby the plaintiff has lost the whole of it." There were also counts for money lent, money received, and on an account stated.

Pleas: (1) To the first count: That defendant did not make the said note, etc. Issue thereon. (2) To the second count: "That the plaintiff did not retain or employ the defendant and the said W. H. Smith, nor did the defendant and the said W. H. Smith accept such retainer or employment, in manner, etc. Issue thereon. (3) To the second count: "That the defendant and the said W. H. Smith did not take said money in the said second count mentioned from the plaintiff as in that count alleged." Issue thereon. (4) To the residue of the declaration: "Nunquam indebitatus." Issue thereon.

On the trial it appeared that defendant and William Henry Smith agreed that they would "become, continue, and be copartners in the * * * profession of an attorney and solicitor, and all matters and things usually connected with, or forming part of, the carrying on of the same, or in any way or manner incidental thereto," for twelve years. * * * Subsequently to the execution of this agreement Smith had, without the knowledge of defendant, received from plaintiff, professedly on behalf of the firm, a sum of £1,670. According to some of the evidence, plaintiff had given a general direction that this sum should be invested by the firm for her by way of mortgage; but according to other evidence she deposited it in order that it should be advanced on a particular mortgage, if that security turned out to be good. Smith, however, retained the money so deposited for his own private purposes, and prevailed on plaintiff to take, as security for it,

the promissory note mentioned in the declaration, which, without the knowledge of defendant, he signed in the name of the firm, "Smith & Johnson." Smith afterwards absconded, and plaintiff brought the present action against defendant alone.

The Chief Justice, after intimating his opinion that there was not evidence to fix the defendant with any liability on the promissory note, told the jury, with respect to the rest of the declaration, that, if the plaintiff employed Smith as the partner of Johnson, meaning to employ the firm of Smith & Johnson to invest the money for her on mortgage, or gave Smith the money for that purpose, and Smith represented to her that the firm of Smith & Johnson could invest the money for her on mortgage, the defendant was liable, inasmuch as the receipt of the money by Smith for the purpose of its being laid out on mortgage would be an act within the scope of authority which Smith had as partner with the defendant; for that attorneys now, as part of their business, acted as scriveners—that is, in laying out money on security—the separate profession of scrivener having fallen into disuse. Verdict for plaintiff for £1,670.

McCauley, in last Easter Term, obtained a rule nisi for a new trial on the ground of misdirection.

Lord CAMPBELL, C. J. I think there should be a new trial. The action is against Johnson, who is charged in the character of a partner with Smith in the calling of an attorney. There is no evidence going beyond the bare fact of their having jointly carried on the business of attorneys. I think that an attorney, qua attorney, is not a scrivener; that his business is to act in a court of law, to prepare conveyances, to examine titles, and so on, but not to act as a scrivener. A scrivener has to hold the money put into his hands until he has an opportunity of laying it out; but this employment of scrivener is not a consequence of his character of attorney. The question, then, here is whether Smith was acting within the scope of his partnership authority. If he received the money generally for the purpose of laying it out, he was not acting within his calling of attorney. Attorneys frequently do act as scriveners in the full sense of the term; but there is no evidence that Smith and Johnson did so, or that the money received was received for purposes within the object of the partnership. There was strong evidence that Smith received the money to be laid out upon mortgage, and that he induced Mrs. Harman to intrust him with the money by representing that he had a security ready; but I cannot say that this was conclusive. And, when I advert to the terms in which I directed the jury, I think that they were too general; for, if the meaning of Mrs. Harman was that a security should be found, and that the money should be left in order to be invested in some mortgage that might be found to be an eligible security, then the business was not to be performed in the character of an attorney. I think, therefore, that the question was left too widely to the jury. It should have been left more pointedly to them whether the money was placed

in Smith's hands for the purpose of being advanced on a particular mortgage, or whether it was deposited with him until he could find a proper mortgage. Had it been so left, the jury should have been told to find for the plaintiff on the first supposition and for the defendant on the second.

Rule absolute.

GILRUTH v. DECELL.

(Supreme Court of Mississippi, 1894. 72 Miss. 232, 16 South. 250.)

Bill in chancery, reciting that complainant was in 1892 the wife of T. F. Decell, deceased, who was then a member of the firm of Gilruth & Decell; that at that time she was the owner of a house and lot in Jackson, Miss.; that she sold same, and that $1,600 of the purchase money was placed to her credit in the Capital State Bank of Jackson; that the amount was withdrawn from said bank on a check drawn January 11, 1892, in favor of the Bank of Yazoo City; that to said check complainant's name and that of T. F. Decell were signed; that complainant's signature was forged by T. F. Decell; that she was ignorant of the forgery for some months thereafter, and that she left her husband in March, 1893, and that he was killed soon afterwards, and that T. J. Moore was the administrator of his estate; that J. N. Gilruth, as surviving partner, after qualifying as required by law, took charge of the partnership property, and is now administering the same; that the $1,600 obtained by the forgery was placed to the credit of T. F. Decell in the Bank of Yazoo City, and was checked out by him for his individual use; that on the 16th of February, 1892, he checked on said deposit in favor of Gilruth & Decell for $500, which sum was placed to the credit of T. F. Decell on the books of Gilruth & Decell as capital paid in by him to complete the amount to be contributed by him in the firm of Gilruth & Decell; that said sum of $500 is still in the firm of Gilruth & Decell, and has gone into the hands of the surviving partner; that the removal and conversion of said sum of money by said T. F. Decell was a fraud upon complainant, and that said Decell held same as trustee ex maleficio; that complainant is entitled to have said sum of $500, mingled with the firm assets of Gilruth & Decell, repaid to her out of the firm assets in preference to all other claims against said assets, with interest from the date it was withdrawn. The bill makes Gilruth, as surviving partner, the only defendant, and prays that the court will decree that the said sum of $500 was her money, and was held in trust for her, and went into the firm of Gilruth & Decell impressed with said trust, and that it be refunded her out of the firm assets.

WHITFIELD, J. It is not alleged in the bill that Gilruth actually participated in the fraud by which Decell converted the trust fund to his own use, and afterwards paid it into the firm in payment of the bal-

ance of his subscription to its capital stock; nor that he had any actual knowledge of anything done by Decell in connection therewith. The acts and doings of Decell throughout were wholly outside the scope of the partnership business. Under the circumstances, while there may be some cases to the contrary as Palmer v. Scott, 68 Ala. 382, and Welker v. Wallace, 31 Ga. 362, it is well settled in Mississippi (Pickels v. McPherson, 59 Miss. 216), and generally, that a bill cannot be maintained against the firm to recover from it the trust fund thus put by the guilty partner, without participation or knowledge on the part of the others, into the assets of the firm. Knowledge of the guilty partner in such case is not the knowledge of the firm. Liability of the other partners in such case, if it exist, must grow out of participation, as joint wrongdoers, in the fraud, and not out of the fact that they are partners, or their liability as partners. Bates, Partn. § 481; Evans v. Bidleman, 3 Cal. 435; 1 Lindl. Partn. pp. *142, *143. Jessel, M. R., thus emphatically puts it in Williamson v. Barbour, 9 Ch. Div. 535, 536: "When we come to a question of fraud, different considerations arise. It is not true that the knowledge of a fraud by a partner is necessarily the knowledge of the firm. A very obvious instance * * * may be shown, and is best shown, by an example. Suppose there is a firm with half a dozen partners who have a clerk, and the clerk has been in the habit of receiving presents from one of the sellers to the firm in order to pass goods of short weight, and further suppose that the clerk, not having been found out, is taken into partnership as a junior partner and continues the practice. Is it to be imagined, under these circumstances, that in a court of equity the other partners could not sue the vendor of the goods for the fraud, and not only sue him but their partners also? * * * I emphatically deny that any such doctrine could by any possibility be laid down by any judge, and I need not say it has never been laid down. Of course fraud must be an exception. I put the case of a clerk knowing it before he became a partner, and not interfering with it afterwards. But it is immaterial that the knowledge was acquired during the partnership. * * * It appears to me that that kind of notice will not do when it is applied to cases of fraud." And says Lindley: "If one partner is a trustee, and he improperly employs the trust funds in the partnership business, his knowledge that he is so doing is not imputable to the firm; and therefore, to affect the other partners with a breach of trust, further evidence must be adduced." It is not within the scope of the bill to subject Decell's interest in the partnership assets. Besides, his administrator is not a party. Robertshaw v. Hanway, 52 Miss. 713, 717. The decree is reversed, demurrer sustained, and bill dismissed.

SECTION 6.—POWERS OF PARTNERS AFTER DISSOLUTION.[1]

MAJOR v. HAWKES.

(Supreme Court of Illinois, 1850. 12 Ill. 298.)

The defendants in error sued Major, in the McLean circuit court, to recover an indebtedness due to them as copartners. Major proved the payment of his indebtedness to Hawkes, one of the copartners, after the publication of a notice of dissolution by mutual consent. A verdict was found on the circuit against Major, and he brings the cause to this court by writ of error.

TRUMBULL, J. Upon the voluntary dissolution of partnership, each of the partners, in the absence of any agreement to the contrary, retains the right to collect debts due the firm, and give discharges therefor. Story on Partnership, § 328.

Hawkes had, therefore, just as much right to receive the money from Major, and give the receipt of the firm, as either of the other partners, and the receipt, if honestly obtained, was a defense to the further prosecution of the action. The fact that Major first made an attempt to settle the account by giving Hawkes credit upon a claim which he had against him individually, did not prevent him from afterwards paying the money to Hawkes, when he ascertained that the other partners would not assent to the first arrangement. Major was not responsible for the application which Hawkes made of the money, so that he paid it in good faith; nor does the insolvency of Hawkes at the time alter the case. The record shows that he was known by the other partners to have beeen insolvent when the partnership was formed. They were willing to trust him notwithstanding, and by becoming his partners gave to him the same right to receive the debts that should become due the firm which either of them should possess. It is true that without the assent of his copartners he had no right to apply partnership effects in discharge of his individual indebtedness, and a creditor of his, knowingly receiving such effects in discharge, would be responsible for the same to the firm.

To deprive Major of the benefit of the payment made to Hawkes it was incumbent upon the plaintiffs below to show that it was not made in good faith. It has been suggested by counsel that the money was returned to Major after being paid over; but there is no evidence in the case to justify such a presumption. The witness to the receipt testifies that the money was paid over to Hawkes in his pres-

[1] As to the effect of death of one partner on the firm property, and the rights and liabilities of the surviving partner, see, further, chapter III, section 8, and chapter IV, section 1 (III).

ence, and this is all the evidence in the record about the money. For aught that appears, Hawkes may have accounted with his copartners for the money received from Major; but whether he has or not is quite immaterial to Major, provided he honestly paid the money and has in no way aided or abetted in the misapplication of it. There would be no safety in paying a partnership debt to a single member of a firm, if the debtor was bound to see that the money was properly applied by the partner receiving it.

Judgment reversed.

WHITING et al. v. FARRAND et al.

(Supreme Court of Connecticut, 1814. 1 Conn. 60.)

SWIFT, J. This was an action to recover payment for books contracted to be delivered to the defendants. * * *

It is further insisted on by the defendants that their copartnership was dissolved prior to the delivery of the books; that the plaintiffs could not afterwards deliver them, and bring this action to recover payment for them; but that their remedy is by an action for a breach of contract arising from the dissolution of the copartnership.

Copartners may dissolve their connection at pleasure, and this is no violation of any subsisting contracts with others; for they may, and they are bound to, perform them in the same manner as if no dissolution had taken place. No action can ever be sustained against them, stating a mere dissolution of the partnership as a breach of contract; for they can perform it notwithstanding such dissolution. In the present case, the contract being executory, the plaintiffs could have no right of action till they had performed on their part. If, then, a dissolution of the copartnership by the defendants could prevent the plaintiffs from delivering the books, and excuse the defendants from receiving or becoming chargeable for them, it would be in the power of a partnership, by its own act of dissolution, to destroy a previous and subsisting contract. This would be directly subverse of the principles on which all copartnerships are founded.

New trial not to be granted.

GOODSPEED v. WIARD PLOW COMPANY.

(Supreme Court of Michigan, 1881. 45 Mich. 322, 7 N. W. 902.)

CAMPBELL, J. Goodspeed and Fales, prior to February 13, 1879, were partners in business, and on the 21st day of January, preceding the dissolution, Fales, in the name of the firm, but in the absence of Goodspeed, and without his knowledge or authority, gave to an agent of the Wiard Plow Company an order in writing for a large number

of articles connected with their business, to be shipped on the 1st day of April thereafter. On the 13th of February the firm was dissolved, and on the same day the agent was informed of the dissolution. The price of the articles ordered was shown to be above $500. On the 15th of February a portion of the articles were shipped, and the remainder, some earlier and some later than April. All came into the hands of Fales. There was no proof of any other acceptance of the order than the shipment, unless the agent at the time of receiving the order made some arrangement on the subject, which is not shown.

On a suit against Goodspeed and Fales the court held that the shipment of goods and their reception by Fales bound Goodspeed, and that the fact that the time of shipment was different from that named in the order made no difference.

We think this was erroneous, and that there was no ground of recovery. A retiring partner is bound by all previous contracts made within the line of the business, but after dissolution he is not bound by any new contract made by his copartner.

The order given by Fales made no contract until accepted, and until acceptance could at any time be withdrawn. Inasmuch as the amount of goods exceeded $50, there could be no binding contract as against the Wiard Plow Company without either a writing or some act done on the faith of the order. Here there was no proof of acceptance of the order in writing, if at all. The shipment of the goods was not made in accordance with the terms of the order, and was not made until the order had been rescinded by notice of the dissolution. Fales could not waive any of the conditions, so as to bind Goodspeed, after the dissolution. The sale made was not the sale agreed upon, if there was any agreement. The case is therefore doubly defective, in not showing any valid agreement at all, and in showing a departure from the agreement proposed. Either objection is fatal to a recovery.

Judgment was reversed, and a new trial ordered.

PALMER v. DODGE.

(Supreme Court of Ohio, 1854. 4 Ohio St. 21, 62 Am. Dec. 271.)

RANNEY, J. Short and Palmer were partners in business from 1836 to June 28, 1841. During the existence of the partnership the firm borrowed money of one Sally Dana, for which a promissory note was given, and several times renewed, and which remained unpaid at the time the partnership was dissolved. After the dissolution, and on April 15, 1842, Short, in the name of E. Short & Co., with the defendant in error as surety, executed a new note to Mrs. Dana for the principal and interest then due, payable in one year. It was proved that the agent of Mrs. Dana, who took this note, knew the partnership was dissolved, and it was further shown that Dodge took the newspaper

in which the notice of dissolution was published. This note was once renewed by the same parties, and subsequently, and after the death of Short, was paid off by the surety, Dodge, who brought this action to recover the amount of Palmer as so much money paid for the use of the firm.

On these facts the counsel for Palmer requested the court to charge the jury that E. Short, after the dissolution, had no authority to give said note to a person having knowledge of the dissolution, so as to bind the late firm of E. Short & Co.; and the said Dodge, having gone security on the note given after the dissolution, and with notice of it, had no right to recover from Palmer the money paid by him in discharge of the note.

The court refused to give these instructions, but charged the jury that Short, after the dissolution, could not give a note in the name of the firm so as to bind his copartner thereby; but if Short, in the performance of his agency in settling up the business of the firm, thought it necessary for the interests of the firm to renew the note, and in good faith obtained Dodge as security for that purpose, he (Dodge) might recover from Palmer the amount originally loaned to the firm, with 6 per cent. interest thereon.

As no claim is made that Palmer came under any direct engagement to Dodge, or that he ever authorized Short to execute this particular note, or afterward recognized or ratified his act, it is evident the case must depend upon the authority retained by Short, as a member of the dissolved partnership, or upon that specially derived from the agreement of dissolution. We have carefully considered the case in both these aspects, and can see no sufficient reason why the instruction asked for should have been refused. Indeed, it seems quite impossible to justify the refusal, or support the charge as given, consistently with well-established and salutary principles applicable to the law of partnerships.

During the continuance of the partnership each member has the undoubted right to bind his associates to the performance of every contract he may make in the name of the firm, within the limits allowed by the articles of association; and they are equally bound to third persons, having no notice of any special limitation of his power, upon all contracts within the scope and objects of the partnership, although he may have overstepped such limitations. In such cases the contracting partner acts for himself, and as the authorized agent of his copartners. His authority, it is true, need not necessarily arise from the express terms of the partnership agreement; but the law implies it from the community of interest and joint object for which the association is formed, and, as it is ordinarily necessary to the attainment of its ends, reasonably infers the power of each to act for all, as within the understanding and contemplation of the parties. They are supposed to have reposed this confidence in each other, and, however much it may be abused, in behalf of innocent third persons the conclusive

answer is that the loss must fall upon those who have given the ability to do the wrong.

This capacity continues as long as the joint operations of the firm endure and contracts are necessary to accomplish its purposes. For the protection of third persons it may continue longer. As the period of its dissolution, by the agreement of the parties, may only be known to themselves, the law exacts, not only that they should hold themselves out no longer as operating jointly, but that they use reasonable diligence to advise others of the termination of their previous connection. As to those who have previously dealt with the firm, the notice must be actual. As to others, public notice in some newspaper circulating in the neighborhood is sufficient, if even that is required.

In such cases the other partners are charged for their negligence in omitting to perform a duty which the law requires at their hands, intended to protect third persons against the unauthorized acts of their associates. But, where no question of notice intervenes, the dissolution works an absolute and unqualified revocation of all power and authority in either of the partners to bind the others to any new engagement, contract, or promise. In the language of Judge Story (Story on Part. § 322): "None of the partners can create any new contracts or obligations binding upon the partnership. None of them can buy or sell or pledge goods on account thereof. None of them can indorse or transfer the partnership securities to third persons, or in any other way make their acts the acts of the partnership. In short, none of them can do any act or make any disposition of the partnership property or funds in any manner inconsistent with the primary duty, now incumbent on all of them, of winding up the whole concerns of the partnership."

As the dissolution finds the engagements of the company, they must remain until liquidated and paid, unless all the partners consent to come under new engagements, or otherwise change their character. But, while the law thus effectually revokes the implied authority of each partner to incur new obligations for his fellows, it leaves upon each of them the duty, and continues to each the right, of doing whatever is necessary to collect the debts due to the partnership, and to adjust, settle, and pay its debts. "For [as stated by the same author] all these acts, if done bona fide, are for the advancement and consummation of the great objects and duties of the partners upon the dissolution, to wind up the whole partnership concern and divide the surplus, if any, among them, after all debts and charges are extinguished."

This right of each of the partners to participate in the settlement of its concerns cannot be interfered with by his copartners, without subjecting them to the controlling power of a court of equity; but it may, of course, be voluntarily relinquished by himself, or he may, if he sees fit, invest them with more extended authority than the law will imply in their behalf.

Appended to the notice of dissolution signed by the partners and published in this case is this clause: "The remaining unsettled business of the firm will be adjusted by E. Short, who is hereby authorized to close all business transactions of the late firm." This notice is good evidence of the agreement of the parties, and conclusive in favor of third persons who have dealt with Short, relying upon it. But no one could or had a right to understand it as authorizing Short to do more than to adjust and settle the unfinished business and close up the transactions of the firm. This power he had, without the agreement. It added nothing to the authority which the law gave, and took nothing from it. Without the agreement, Palmer would have had equal authority, and the utmost effect that can be given to the stipulation would be to consider it as a surrender of the right by him, and as having invested Short alone with the power before possessed by both.

There is not a word in it to indicate an intention to confer upon him the authority to create new obligations. He is, therefore, remitted to his power as a partner, and, considered in that light, it is very clear he possessed no such authority. The elementary books and adjudged cases speak an almost uniform language upon the subject. * * *

We should find no difficulty in holding that the proof of the dissolution was sufficient to charge Dodge, in the absence of any proof on his part to show that he had dealings with the firm before its dissolution. But this question is wholly immaterial, as the court in effect took it from the jury, and charged that Dodge would be entitled to recover, notwithstanding he had notice, if Short in good faith thought it necessary to renew the note and procured him to become security on it. In this we think they erred; and the judgment, so far as the amount of this note entered into it, must be reversed.[1]

HUMPHRIES v. CHASTAIN.

(Supreme Court of Georgia, 1848. 5 Ga. 166, 48 Am. Dec. 247.)

Assumpsit on a note indorsed in the firm name of Chastain & Harvey, the indorsement having been made by Harvey (now insolvent), without the authority of Chastain, after the dissolution of the firm. Evidence offered to show that the indorsement was in payment of a previous debt of the firm having been rejected, the plaintiff, after judgment against him, brought error on that ground.

[1] In Smith v. Shelden, 35 Mich. 42, 47, 24 Am. Rep. 529, supra, in passing upon the question of the power of a partner after dissolution to give notes in settlement of firm debts, Cooley, C. J., said: "We think it much safer to require express authority, when such obligations are contemplated, than to leave one party at liberty to execute at discretion new contracts of this nature, which may postpone for an indefinite period the settlement of their concerns, when a settlement is the very purpose for which he is to act at all."

WARNER, J. The question made by the record in this case is whether one partner, after the dissolution of the copartnership, can bind his copartner by a new contract for the payment of a pre-existing copartnership debt. That after the dissolution of a copartnership, one copartner cannot bind the other by indorsing a note in the copartnership name is, we think, well settled, both upon principle and authority; and that the note so indorsed is in payment of a debt due by the copartnership makes no difference. Lyon on Part. 274; Sanford v. Mickles, 4 Johns. (N. Y.) 224; Hackley v. Patrick, 3 Johns. (N. Y.) 536; Folz v. Pourie & Dawson, 2 Desaus. Eq. 40. In Bell v. Morrison, 1 Pet. (U. S.) 352, 7 L. Ed. 174, it was held that a dissolution of a copartnership puts an end to the authority of one partner, to bind the other. It operates as a revocation of all power to create new contracts; and the court below did not err in rejecting the testimony offered, and ruling that Chastain was not bound by the indorsement made by Harvey, in the name of the partnership, after its dissolution.

Let the judgment of the court below be affirmed.[1]

DARLING v. MARCH.

(Supreme Court of Maine, 1842. 22 Me. 184.)

Assumpsit on a note dated November 13, 1837, for $2,000, signed by Lincoln, Foster & Co., payable to Willis Patten & Co. "at either bank in Bangor" six months after date, and indorsed by Willis Patten & Co. Over the indorsement was written, "Holden without notice or demand," and no demand was proved; the plaintiff relying on the waiver.

It was admitted, or satisfactorily proved, at the trial, that Amos Patten, the defendant's testator, Willis Patten and Moses Patten, Jr., constituted the firm of Willis Patten & Co. prior to the 1st day of October, A. D. 1837; that on the 18th day of January, 1838, and for more than three weeks subsequently, notice that the firm had been dissolved on the preceding 1st day of October, and that Amos Patten had retired, and that a new firm under the same name had been formed by Willis Patten and Moses Patten, Jr., was published in the Daily Whig and Courier, printed at Bangor; that the note, about the time it fell due in May, 1838, was left in the Kenduskeag Bank for collection; that the officers of the bank had knowledge of the dissolution of the old firm at the time notice was published; that about the time the note fell due the words "Holden without notice or demand" were written on the note by Moses Patten, Jr. * * *

[1] In Yale v. Eames, 1 Metc. (Mass.) 486 (1840), it was held that an authority given to one partner by the others, after dissolution, to sell a negotiable note made to the firm before dissolution, authorized the partner to indorse such note "without recourse" in the firm name.

The foregoing facts (and others not material to the point in partnership under consideration) were, by agreement, submitted to the court, who are to order a nonsuit or default as the facts and the law may warrant. * * *

SHEPLEY, J. * * * The next question is whether one member of the firm could bind the other members, after its dissolution, by a waiver of demand and notice on paper existing before the dissolution. The dissolution operates as a revocation of all authority for making new contracts. It does not revoke the authority to arrange, liquidate, settle, and pay those before created. For these purposes each member has the same power as before the dissolution. If an account, existing before the dissolution, be presented to one of the former partners, he may decide whether it should be paid or not, even though it be a disputed claim. He may decide whether due notice had been given on negotiable paper, and may make or refuse payment accordingly. The waiver of demand and notice is but the modification of an existing liability, by dispensing with certain testimony which would otherwise be required. If one of the former partners could not dispense with the proofs, which might be required at the time of the dissolution, he could not liquidate the accounts and agree upon balances. To waive demand and notice, and to settle accounts, is but to arrange the terms upon which an existing liability shall become perfect without further proof. In doing this he does not make a new contract, but acts within the scope of a continuing authority.

Judgment for plaintiff.

BREEN v. RICHARDSON et al.

(Supreme Court of Colorado, 1883. 6 Colo. 605.)

Morrison and Charist were copartners. Morrison died, and Charist, the surviving partner, to secure a debt of the firm, gave a trust deed upon certain real estate owned by them in the town of Silverton. Upon breach of the conditions of the trust deed the land was sold by the trustee, and the appellant, Breen, became the purchaser and was in possession. The appellees, as heirs at law of Morrison, brought suit to recover the undivided one-half interest in the land in controversy, and obtained judgment in the court below. To reverse that judgment Breen prosecutes this appeal.

BECK, C. J. * * * This assignment involves the power of a surviving partner to dispose of the partnership property in the settlement and payment of the partnership debts.

It sufficiently appears that the real estate in controversy was partnership property. It was property necessary for the ordinary business of the partnership, it was purchased for this purpose out of the funds of both partners at the time of the formation of the partner-

ship, and it was employed for the uses of the partnership until the firm was dissolved by the death of Morrison.

The evidence also shows that at the time of the decease of Morrison the firm of Morrison & Charist was indebted beyond the extent of the personal assets.

It is well settled, in such a case, that the partnership real estate is to be considered as personalty for the purpose of paying the firm debts. It is quite as well settled that, for the purpose of being appropriated to the payment of the partnership debts, the real estate, like other personal property of the partnership, must pass under the control of the surviving partner, to be by him disposed of for the payment of the debts.

An objection is made that the surviving partner had no authority to give the trust deed. The evidence shows the necessity for prompt action at the time the trust deed was given, in order to prevent the sacrifice of the property in question, and the law, we think, warranted the execution of the trust deed.

For the errors mentioned, the judgment will be reversed, and the cause remanded for a new trial.

Reversed.

WOOD et al. v. BRADDICK.

(Court of Common Pleas, 1808. 1 Taunt. 104.)

This was an action brought to recover from the defendant the proceeds of certain linens, which the bankrupts, in the year 1796, had consigned for sale in America, as the plaintiffs alleged, to the defendant, jointly with one Cox, who was then his partner, but, as the defendant contended, to Cox only. The defendant pleaded the general issue and the statute of limitations. At the trial at Guildhall, before Mansfield, C. J., the plaintiffs produced in evidence a letter from Cox, dated the 24th of June, 1804, stating a balance of £919 to be then due to the bankrupts upon this consignment.

It was in proof that on the 30th of July, 1802, Braddick and Cox dissolved their partnership, as from the 17th of November, 1800.

Cockell and Lens objected that this letter, being written after the dissolution of the partnership, was not admissible evidence to charge Braddick. The Chief Justice overruled the objection, but reserved the point; and the jury, being of opinion that the agency was undertaken by Cox on the partnership account, found a verdict for the plaintiff.

Cockell now moved for a new trial.

Mansfield, C. J. Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other, in any transaction which has occurred since their separation; but the power of partners with respect to rights created pending the partner-

ship remains after the dissolution. Since it is clear that one partner can bind the other during all the partnership, upon what principle is it that from the moment when it is dissolved his account of their joint contracts should cease to be evidence, and that those who are to-day as one person in interest, should to-morrow become entirely distinct in interest with regard to past transactions which occurred while they were united?

HEATH, J. Is it not a very clear proposition that, when a partnership is dissolved, it is not dissolved with regard to things past, but only with regard to things future? With regard to things past, the partnership continues, and always must continue.

Cockell took nothing by his motion.

MILLER v. NEIMERICK et al.

(Supreme Court of Illinois, 1857. 19 Ill. 172.)

SKINNER, J. Miller sued Neimerick and Eckert, as late partners, upon a book account. On the trial Miller offered in evidence a written statement, made by Neimerick after the dissolution of the partnership, admitting a balance due from the firm of Neimerick & Eckert to Miller. The court rejected the evidence, and judgment was rendered for the defendants.

The question is broadly presented whether admission of one partner, made after the dissolution of the partnership, relating to partnership transactions arising prior to the dissolution, are admissible to charge the several members of the dissolved firm. In the case of Wood v. Braddick, 1 Taunt. 104, such admissions were held competent to charge all the members of the firm, and that ruling seems to have been followed in England until finally avoided by act of Parliament. The same rule has been recognized in several states of this Union, but in many of them the opposite doctrine prevails.

In view of the conflict of authority upon the question, we are at liberty to adopt such rule as is most consonant with the reason and analogies of the law and best adapted to the security of private rights. It is true that, during the existence of the partnership, each partner may act for the whole, upon the ground that all have delegated to each authority to act for them in matters of joint concern; but this plenary power of the several members of the partnership continues no longer than the partnership out of which it arises. Therefore, when the partnership has terminated, the several partners lose their authority to act for the whole, and can no longer bind them by any undertaking in the partnership name; and their powers become limited to the adjustment of the partnership affairs and the winding up of the partnership. For such purposes each may receive and release debts due the partnership, and apply the assets to the liquidation of the firm debts, the

pre-existing rights of their persons remaining unaffected by the dissolution; but the power to bind the several members of the dissolved firm, by the creation of new liabilities and obligations, falls with the partnership.

The admission of one partner of a debt of the partnership, made when the partnership has no existence, if sufficient to establish the liability of all the partners, involves the power to bind all by the creation of a partnership liability; for it is indifferent to the other partners whether their liability be established by the admission, or the undertaking, written or verbal, of one of their number.

The effect in either case is the same. A joint liability is prima facie established and imposed, which may be satisfied, not only out of the partnership property, but out of the separate estates of the former partners.

If the several members of a dissolved firm can, by admission or stipulation, charge their former partners, not only may the partnership assets be swallowed up, but the individual members of the late firm may be made bankrupt, by admissions made after the partnership has ceased to exist, by one no longer their agent, without the sanctions of an oath, or any of the ordinary guarantees of truth, and who may be without pecuniary ability to respond in damages, is influenced by ill will or private gain, and has in fact no real concern as to consequences of mere legal liability.

We hold the written statement or admission incompetent to charge Eckert.

Judgment affirmed.

MAYBERRY et al. v. WILLOUGHBY.

(Supreme Court of Nebraska, 1877. 5 Neb. 368, 25 Am. Rep. 491.)

GANTT, J. In the court below, service of summons was had on C. N. Mayberry only. He pleaded the statute of limitations, and he now brings the case into this court as plaintiff in error.

It appears, from the facts admitted, that the plaintiff in error and J. C. Mayberry were formerly partners, doing business in the state of Illinois, under the firm name of J. C. & C. N. Mayberry; that on the 14th day of January, 1864, the note on which this action was brought was executed by the firm and delivered to the defendant in error; that on the 29th day of March, 1864, the partnership was wholly dissolved, and that on or about the 15th day of July, 1868, the defendant in error had notice of the dissolution of the partnership; that in March, 1869, the plaintiff in error moved to the state of Nebraska, and has ever since resided there. J. C. Mayberry made partial payments on the note, on the 16th day of November, 1864, on the 1st day of June, 1868, on the 25th day of July, 1870, and on the 29th day of November, 1871; and of these payments the plaintiff in error had

no knowledge whatever, until after the commencement of the suit, on the 18th day of April, 1876.

The only question raised in the case is: Do these payments, made by J. C. Mayberry, take the debt out of the statute of limitations as to the plaintiff in error?

It is said that the statute is a wise and beneficial law, and should not be viewed in an unfavorable light; and it is now generally conceded that it is not to be construed as merely raising a presumption of payment, but that in its operation it is intended to be emphatically a statute of repose.

Therefore, in order to take a debt out of it, there must be an unqualified acknowledgment, not only of the debt as originally due, but that it continues so, or, if the promise to pay is conditional, the condition must be performed before an action can be maintained on the promise, and the acknowledgment or promise must be made by the person to be charged, or by some person legally authorized by him to do so.

Again, as the law strictly affects the remedy, and not the merits, it seems well settled that upon the plea of the statute the lex fori must prevail. McElmoyle v. Cohen, 13 Pet. (U. S.) 327, 10 L. Ed. 177; Townsend v. Jemison, 9 How. (U. S.) 413, 13 L. Ed. 194; Bell v. Morrison, 1 Pet. (U. S.) 351, 7 L. Ed. 174.

Hence the law must be regarded as designed to protect persons from ancient claims, whether well or ill founded, and its tendency is to produce speedy settlements, and if such settlements are not made within the time limited by the law its effects are such as to extinguish the legal liability upon the debt, unless it be revived by a new promise; and therefore, if the creditor by his own fault and laches permits the statute to attach, whatever may be the nature or character of his claim, he cannot complain of the operation of the law, since it is by his own negligence that it can be brought to bear against him.

But, as J. C. and C. N. Mayberry were partners at the time the debt was contracted, it is contended that, notwithstanding the dissolution of the partnership with notice thereof to the creditor, and notwithstanding the time limited by the statute within which actions can be commenced after the cause of action shall have accrued, had long expired, as to the plaintiff, yet the payments made by J. C. Mayberry, as above stated, and without the knowledge or assent of the plaintiff in error, constitute an admission by both, and in law raise a promise by both to pay the claim; and this proposition is urged upon the ground that, as J. C. Mayberry had authority to discharge the debt or make payments thereon, he necessarily had authority, upon the theory that a virtual agency existed in each co-contractor, by his individual promise to charge the other with the payment of the debt. This is true as to partners, for it is a familiar and well-established doctrine that during the existence of the partnership the act of one partner within the legitimate scope of the partnership business, will

bind the other partners; and this doctrine, no doubt, had its origin in the fact that in a partnership, constituted by voluntary contract, with the understanding that there shall be a communion of profits between them, there must necessarily be in each partner a community of interest with the others in the whole property, business, and responsibilities of the concern, and therefore each partner is "præpositus negotiis societatis," and in the diverse and multiplied transactions of the business, each must, virtute officii, become the agent of the others, when acting within the scope and objects of the partnership. But, upon the dissolution of the partnership, this agency, as well as the relation of partners, ceases to exist, and the authority to create new contracts is revoked, and the rights of the partners thereafter can only extend to the settlement of the partnership concerns and the disbursement of the remaining funds. It is said that, "after dissolution, no valid draft, acceptance, or indorsation can be made by the firm; and it is no authority to do so, if any partner is in the notice empowered to receive and pay the debts of the company. The indorsation, draft, or acceptance must be done by all of the partners, or by one specially empowered to do the act for them." 2 Bell's Com. 644; Story on Part. § 332; 1 Smith, Lead. Cases, 730. No new contract can be created in the name of the firm, and no one of the partners can create such contract so as to charge the others, unless they specially authorize him to do so for them.

Now, the doctrine seems well settled by authority that an acknowledgment is to be considered, not as a continuation of the old promise, but as the evidence of a new promise; and therefore it is alone this new promise which takes the debt out of the statute. This new promise is a new contract, nothing more, nothing less; and it is a contract to pay a pre-existing debt, which of itself does not bind the party, because by force of the law it was extinguished. Hence, is not the acknowledgment, in essence and in law, the creation of a new contract, which gives the creditor a new cause of action, and not simply the enforcement of the old one? It therefore seems clear, both upon principle and authority, that, after the relation of partners has ceased to exist, one of the partners cannot, upon the ground of mutual agency, bind the others by such contract. The relation of the partners to their creditors, then, becomes that of joint debtors. Bell v. Morrison, supra; Hackley v. Patrick, 3 Johns. (N. Y.) 537; Green v. Crane, 2 Lord Raym. 1101; Thompson v. Peters, 12 Wheat. (U. S.) 565, 6 L. Ed. 730; Tompkins v. Brown, 1 Denio (N. Y.) 247; Dean v. Hewit, 5 Wend. (N. Y.) 257; Dunham v. Dodge, 10 Barb. (N. Y.) 569.

It is, however, urged that the acknowledgment relied on in the case at bar consists of partial payments made on the original debt of J. C. Mayberry, and, as some of these payments were made before the time limited by the statute had expired, the statute of limitations did not attach as to the plaintiff in error; but it is said "that although

a part payment of a debt admits its existence as a subsisting obligation, and will, therefore, be sufficient to take it out of the statute, yet that it has no greater effect than any other unqualified acknowledgment, and must consequently be connected by sufficient evidence, both with the parties to the suit and the claim sought to be enforced." 1 Smith's Lead. Cases, 726. Such payments necessarily prove only the existence of the debt to the amount paid; but from the fact of such payment a promise is inferred to pay the residue. Dunham v. Dodge, supra. And, again, it is said: "The true rule unquestionably is that whether the admission precedes or follows the bar makes no difference, and that, while proof of the continued existence of the debt and of the willingness of the debtor to pay is requisite in all cases, nothing more will be requisite in any." 1 Smith's Lead. Cases, 714; Ayers v. Richards, 12 Ill. 146; Fryeburg v. Osgood, 21 Me. 176.

And now the question is, can one joint debtor, by an assumed authority as the virtual agent of the other, legally charge him with the payment of the debt, when otherwise he would be discharged, and the debt be extinguished as to him, by operation of the statute?

The doctrine that a promise or acknowledgment by one joint debtor takes the debt out of the statute, and binds his co-contractor, upon the ground that he who makes the promise virtually acts as the agent of the other, seems to have originated in an unreasoned decision of Lord Mansfield in the case of Whitcomb v. Whiting, Doug. 651. But that case is contrary to the previous case of Bland v. Haselrig, 2 Vent. 151, and it must be regarded as the cause of all the confusion which exists in the decisions, both in England and America, on the subject of the statute, in respect to joint debtors.

In England, however, the doctrine enunciated in Whitcomb v. Whiting has been somewhat restricted, which has remedied some of the mischief inherent in it. 1 B. & Ald. 467. And its force has been much weakened in the case of Atkins v. Tredgold, 2 Barn. & C. 23, in which Holroyd, J., seems to doubt Whitcomb v. Whiting as law.

Story, in his work on Partnership (section 324), says that: "In America no small diversity of judicial decision has been expressed on this subject. In some of the states, the English doctrine has been approved; in others it has been silently acquiesced in, or left doubtful; and in a considerable number it has been expressly overruled." In the Supreme Court of the United States it has been overruled, as unfounded in principle. Bell v. Morrison, supra; Van Keuren v. Parmelee, 2 N. Y. 525, 51 Am. Dec. 322; Dunham v. Dodge, 10 Barb. (N. Y.) 570; Forney v. Benedict, 5 Barr (Pa.) 227. * * *

It seems the doctrine that one joint debtor can take a debt out of the statute as to all is based exclusively on the theory that there is a virtual agency in each co-contractor, in such case, by which the promise of one binds the rest. But upon what principle can this doctrine of mutual agency be maintained? It cannot be founded on a communion of profits or a community of interests, as in the case of

partnership, for the reason that in fact no such interests exist between the persons who are merely joint debtors; and it cannot be grounded merely upon a new promise by only one of the parties, for the reason that in fact and in law, as seems now to be well settled, such promise is a new contract, which is necessarily different from the original contract in respect to form, time, and substance, and is the creation of a new cause of action; and the proposition will not be questioned that one joint debtor can, by such new contract, bind his co-contractors. It is, therefore, certainly difficult to discover any just grounds upon which the doctrine of mutual agency in joint debtors can be founded; hence must it not rest alone upon a mere assumption, which is untrue in fact, and unsupported by any reasonable and just interpretation of law?

It is not only contrary to the earlier cases in England, but we think it is opposed to the object and spirit of our statute, which, it seems clear, was intended to protect the individual against claims after the time limited by the law for the commencement of the action has expired. The statute is one of repose; and, when the time limited by it has expired, then in legal contemplation the debt is extinguished, and it can only be revived by a new promise by the person sought to be charged, or by some person lawfully authorized by him for that purpose. * * *

We are, therefore, of opinion that the plea of the statute of limitations, interposed by the plaintiff in error, constituted a good defense in this action, under the evidence in the case, and that the judgment of the court below must be reversed, and the cause remanded.

Judgment reversed.

CHAPTER VI.

RIGHTS AND DUTIES OF PARTNERS INTER SE.

SECTION 1.—DUTY TO OBSERVE GOOD FAITH.

BURTON v. WOOKEY.

(In Chancery, before Sir John Leach, V. C., 1822. 6 Madd. 367.)

The plaintiff and defendant entered into partnership together to deal in lapis calaminaris. The defendant, who was a shopkeeper, was to take the active part in the concern, and to purchase the lapis calaminaris from the miners, in whose neighborhood he lived. Many of the miners were, before the partnership, in the habit of dealing at his shop, and continued so for some years after the partnership, receiving from the defendant ready money for the lapis calaminaris, and paying for their shop goods afterwards as they would have done to any shopkeeper; but in the year 1817 or 1818, owing, as the defendant alleged, to the distress of the times, a new course of dealing took place between the defendant and the miners. In the place of paying them for the lapis calaminaris with money, he paid them with shop goods, and in his account with the plaintiff he charged him as for cash paid to the amount of the price of the goods.

The question was whether he could justify this charge, or whether he must divide the profit made by him on the sale of the goods with the plaintiff.

The VICE CHANCELLOR. It is a maxim of courts of equity that a person who stands in a relation of trust or confidence to another shall not be permitted, in pursuit of his private advantage, to place himself in a situation which gives him a bias against the due discharge of that trust or confidence. The defendant here stood in a relation of trust or confidence towards the plaintiff, which made it his duty to purchase the lapis calaminaris at the lowest possible price. When, in the place of purchasing the lapis calaminaris, he obtained it by barter for his own shop goods, he had a bias against a fair discharge of his duty to the plaintiff. The more goods he gave in barter for the article purchased, the greater was the profit which he derived from the dealing in store goods, and as this profit belonged to him individually, and as the saving by a low price of the article purchased was to be equally divided between him and the plaintiff, he had plainly a bias against the due discharge of his trust or confidence towards the

plaintiff. I must therefore decree an account of the profit made by the defendant in his barter of goods, and must declare that the plaintiff is entitled to an equal division of that profit with the plaintiff.

MITCHELL v. REED.

(Commission of Appeals of New York, 1876. 61 N. Y. 123, 19 Am. Rep. 252.)

Appeal from judgment of the General Term of the Supreme Court in the First Judicial Department, affirming a judgment in favor of defendant, entered upon decision of the court at Special Term.

This action was brought to have certain leases, obtained by the defendant during the existence of a copartnership between him and plaintiff, for terms to commence at its termination, of premises leased and occupied by the firm, declared to have been taken for the partnership, and to have it adjudged that the defendant held them as trustee for the partnership. * * *

The court found, as conclusions of law, that the defendant, Reed, was the sole owner of the leases executed to him as aforesaid, and that the plaintiff had no right, title, or interest in or to them, or either of them, and that the defendant have judgment accordingly, to which plaintiff duly excepted. Judgment was rendered accordingly.

Earl, C. The relation of partners with each other is one of trust and confidence. Each is the general agent of the firm, and is bound to act in entire good faith to the other. The functions, rights, and duties of partners in a great measure comprehend those both of trustees and agents, and the general rules of law applicable to such characters are applicable to them. Neither partner can, in the business and affairs of the firm, clandestinely stipulate for a private advantage to himself. He can neither sell to nor buy from the firm at a concealed profit to himself. Every advantage which he can obtain in the business of the firm must inure to the benefit of the firm. These principles are elementary, and are not contested. Story, §§ 174, 175; Collyer, §§ 181, 182. It has been frequently held that when one partner obtains the renewal of a partnership lease secretly, in his own name, he will be held a trustee for the firm as to the renewed lease. It is conceded that this is the rule where the partnership is for a limited term, and either partner takes a lease commencing within the term; but the contention is that the rule does not apply where the lease thus taken is for a term to commence after the expiration of the partnership by its own limitation, and whether this contention is well founded is one of the grave questions to be determined upon this appeal.

It is not necessary, in maintaining the right of the plaintiff in this case, to hold that in all cases a lease thus taken shall inure to the benefit of the firm, but whether, upon the facts of this case, these leases ought to inure to the benefit of this firm. I will briefly allude

to some of the prominent features of this case. These parties had been partners for some years. They were equal in dignity, although their interests differed. The plaintiff was not a mere subordinate in the firm, but, so far as appears, just as important and efficient in its affairs as the defendant. They procured the exclusive control of the leases of the property, to terminate May 1, 1871, and their partnership was to terminate on the same day. They expended many thousand dollars in fitting up the premises, a portion thereof after the new leases were obtained, and they expended a very large sum in furnishing them. By their joint skill and influence they built up a very large and profitable business, which largely enhanced the rental value of the premises. More than two years before the expiration of their leases and of their partnership the defendant secretly procured, at an increased rent, in his own name, the new leases, which are of great value. Although the plaintiff was in daily intercourse with the defendant, he knew nothing of these leases for about a year after they had been obtained. There is no proof that the lessors would not have leased to the firm as readily as to the defendant alone. The permanent fixtures, by the terms of the leases, at their expiration belonged to the lessors. But the movable fixtures and the furniture were worth vastly more to be kept and used in the hotel than to be removed elsewhere. Upon these facts I can entertain no doubt, both upon principle and authority, that these leases should be held to inure to the benefit of the firm. If the defendant can hold these leases, he could have held them if he had secretly obtained them immediately after the partnership commenced, and had concealed the fact from the plaintiff during the whole term. There would thus have been, during the whole term, in making permanent improvements and in furnishing the hotel, a conflict between his duty to the firm and his self-interest. Large investments and extensive furnishings would add to the value of his lease, and defendant would be under constant temptation to make them. While he might not yield to the temptation, and while proof might show that he had not yielded, the law will not allow a trustee thus situated to be thus tempted, and therefore disables him from making a contract for his own benefit. Terwilliger v. Brown, 44 N. Y. 237, and cases cited. It matters not that the court at Special Term found upon the evidence that the improvements were judicious and prudent for the purposes of the old term. The plaintiff was entitled to the unbiased judgment of the defendant as to such improvements, uninfluenced by his private and separate interest. But, further, the parties owned together a large amount of hotel property in the form of furniture and supplies, considerably exceeding, as I infer, $100,000 in value. Assuming that the partnership was not to be continued after the 1st day of May, 1871, this property was to be sold, or in some way disposed of for the benefit of the firm, and each partner owed a duty to the firm to dispose of it to the best advantage. Neither could, without the violation of his duty to the firm, place the property in such

a situation that it would be sacrificed, or that he could purchase it for his separate benefit, at a great profit. Much of this property, such as mirrors, carpets, etc., was fitted for use in this hotel, and it is quite manifest that all of it would sell better with a lease of the hotel than it would to be removed therefrom. It is clear that one or both of these parties could obtain advantageous leases of the hotel for a term of years, and hence, if the parties had determined to dissolve their partnership, it would have been a measure of ordinary prudence to have obtained the leases and transferred property with the leases as the only mode of realizing its value. This was defeated by the act of the defendant, if he is allowed to hold these leases, and thus place himself in a position where the property must be largely sacrificed or purchased by himself at a great advantage. This the law will not tolerate. The language of Lord Eldon, in Featherstonhaugh v. Fenwick, 17 Ves. 311, a case in many respects resembling this, is quite in point. He says: "If they [the defendants] can hold this lease, and the partnership stock is not brought to sale, they are by no means on equal terms. The stock cannot be of equal value to the plaintiff, who was to carry it away and seek some place in which to put it, as to the defendants, who were to continue it in the place where the trade was already established; and if the stock was sold the same construction would give them an advantage over the bidders. In effect they would have secured the good will of the trade to themselves in exclusion of their partner." For these reasons, independently of the consideration that the leases themselves had a value to which the firm was entitled, upon other grounds and upon authorities, to be hereafter cited, the plaintiff, who commenced his suit about one year before the term of the partnership expired, was, upon undisputed principles and authorities applicable to all trustees and persons holding a fiduciary relation to others, entitled to the relief he prayed for. * * *

I am therefore of opinion that the judgment should be reversed, and new trial granted; costs to abide the event.

JENNINGS et al. v. RICKARD.

(Supreme Court of Colorado, 1887. 10 Colo. 395, 15 Pac. 677.)

ELBERT, J. Charles Rickard, the plaintiff below, on the 18th of December, 1882, filed his bill of complaint against the defendants, John and Daniel Jennings, claiming a decree against them for $20,200, on account of certain partnership transactions. He alleges that in the fall of 1874 he and the defendants entered into a mining copartnership for the purpose of collecting mineral specimens, and also for the purpose of discovering, locating, and developing lodes and mining properties; that by the terms of such copartnership agreement Rickard was to furnish certain moneys, horses, wagons, etc.; that the defend-

ants were to do the active work in the field in prospecting and locating mining claims, and that each were to have a one-third interest in all mining claims discovered and located by the defendants; that this copartnership continued until April, 1878; that during this time the defendants discovered and located the Mammoth, the Empire, and the Trail lodes, and a certain claim to coal lands, and reported the same to plaintiff as properties belonging to the copartnership; that they reported the aforesaid lodes as being all that had been discovered, located, and claimed by them during the continuance of the copartnership agreement. He alleges that on the 19th of March, 1878, he conveyed to said defendants, for the sum of $100, all his interest in and to the foregoing copartnership properties. Concerning this conveyance of the 19th of March, 1878, he alleges a distinct and separate fraud upon the part of defendants Jennings, by reason of which he is entitled to a decree against them for $200. This fraud concerns properties admittedly belonging to the copartnership, and will be considered first.

Under the terms of the copartnership, the lodes were located for convenience in the names of the defendants, and they were authorized to negotiate and sell them, accounting to plaintiff for one-third of the proceeds. The evidence clearly shows that on or about the 19th of March, 1878, the defendants approached the plaintiff concerning a purchase of his third interest in the foregoing copartnership properties, and that the negotiation resulted in the sale by plaintiff to defendants of his third interest in the same for the sum of $400, which he then and there conveyed by deed of that date to defendants. It also quite clearly appears that at the time of this sale the defendants were negotiating a sale of the copartnership coal claim to one Smith, for the sum of $1,800. Although this sale to Smith was not consummated until some time thereafter, the deed to Smith, which was placed in escrow, bears date March 19, 1878, the date of the conveyance by the plaintiff to defendants of his one-third interest in the copartnership properties. The one-third interest of the plaintiff in the proceeds of the sale of this coal mine would have amounted to $600, $200 more than the defendants paid him for his entire interest in the four claims.

The partnership relation is a trust relation, and the members of a copartnership are held to a strict rule of good faith and fair and open dealing. He who assumes the relation invites the confidence of his copartners, and pledges fidelity to the interests of the copartnership. The requirements of the copartnership relation which the defendants sustained to the plaintiff demanded that, at the time of the negotiation for a sale of his third interest in the copartnership properties, they should have made known to him the negotiation which was then pending with Smith for the sale of the coal claim for the sum of $1,800. Their concealment of this negotiation from the plaintiff was the concealment of an important fact, affecting the value of plaintiff's copartnership interest for which they were negotiating. It enabled

them to deal with him on unfair and unequal terms. It was a fraud, and equity and good conscience required that defendants should account to plaintiff for one-third of the proceeds of that sale.

The sale by plaintiff to defendants of his one-third interest in the copartnership properties, to wit, the Mammoth, the Empire, and the Trail lodes, and the coal claim, was a sale in gross for $800. The consideration paid for each property respectively, does not appear. As the plaintiff introduced no evidence upon this point, and only prayed in his bill of complaint that the defendants be decreed to account for the sum of $200, the difference between the entire consideration paid him for the whole property and his third interest in the proceeds of the sale of the coal claim, the court was justified in limiting its decree in this behalf to that sum.

Secondly. The plaintiff alleges another and distinct fraud respecting certain mining properties, which he claimed belonged to the copartnership, a claim which the defendants contest. Plaintiff alleges that, during the continuance of said copartnership agreement, the defendants discovered and located certain other mining claims, viz., the Cliff, the North Star, the Hiawassee, the Galena, the East Wing, the Buckeye, and the Sylvanite; that under the terms of their copartnership agreement he was entitled to a one-third interest in the same, but that the defendants fraudulently concealed from him the discovery and location of said claims, and that he never knew of the existence of said claims, or of his rights therein, until on or about the 27th day of September, 1879, when the defendants sold and conveyed said claims to one Ballentine for the sum of $60,000. By reason of this fraud upon the part of defendants, the plaintiff claims a decree for $20,000, one-third of the proceeds of said sale to Ballentine.

The defendants, in their answer, deny the copartnership, except as thereinafter stated, and "thereinafter" they say "that they, the defendants, further answering, admit that they entered into an agreement with plaintiff to gather specimens and prospect for lodes, substantially as set out in the complaint, and that such agreement continued until the early part of the year 1878." They set forth the sale and deed of the 19th of March, 1878, by plaintiff to defendants, and say "that, upon the completion of such sale by plaintiff to defendants, it was then and there agreed by and between them that all former associations, agreement, copartnership, and business relations theretofore existing between plaintiff and these defendants should cease, and the same were then and there fully dissolved and terminated." In view of the testimony, as will be seen, this is an important admission. They deny any fraudulent concealment of lodes discovered and located as alleged in the complaint, but claim that the Mammoth, the Empire, the Trail lodes, and the claim to coal lands, reported by them to plaintiff as copartnership properties, were all the lodes discovered and located by them during the continuance of the copartnership, from the fall of 1874 to the spring of 1878.

Upon the admissions of the defendants in their answer and testimony, the Cliff, the Hiawassee, the Galena, and the North Star must be treated, without hesitancy, as properties belonging to the copartnership. The defendants, in their answer, admit that the copartnership formed in 1874 continued until the spring of 1878. The copartnership must be treated as extending to all mining properties discovered and located by the defendants during that period, in the absence of any limitation. John Jennings admits in his testimony that the four lodes named were discovered and located in 1876 and 1877. The defendant, Daniel Jennings, while he does not testify upon this point, does not in any way controvert or disclaim it. It is true that they both claim in their testimony that they understood that the copartnership was dissolved in the spring of 1876, when the copartnership "specimen store" was sold; but this testimony does not support the allegations of the answer, the admissions of which, upon this point, must be held to control.

It appears from the testimony that these four mines belonged to the group of ten which were sold to Ballentine for the sum of $12,000. There is no evidence fixing the separate value of the mines which constitute this group. In the absence of any evidence upon this point, the respective mines constituting the group must be treated of equal value. In so far, therefore, as the decree of the court below was based upon the right of the plaintiff to recover one-third of the proceeds arising from the sale of the Cliff, the Hiawassee, the North Star, and the Galena is concerned, we think it is justified by the pleadings and the evidence.

It appears that three other mines which plaintiff claims belong to the copartnership, viz., the Sylvanite, the Buckeye, and the East Wing, were at the same time, namely, on the 27th of September, 1879, conveyed to Ballentine by a separate deed, and that the true consideration therefor was $48,000. This sum, together with the $12,000 for which the other group sold, constitutes the $60,000 for the one-third of which plaintiff claims a decree.

It remains, therefore, to determine whether, upon the evidence, these three mines belonged to the copartnership. The two Jennings and other witnesses testify positively to their discovery and location in 1879, after the copartnership had been admittedly dissolved. It appears that the Sylvanite was by far the most valuable of the three; that the other two were not regarded as of much value. There was an effort upon the part of the plaintiff to show that, while the Sylvanite was not located until 1879, it was really discovered by the Jennings during the existence of the copartnership, and its discovery fraudulently concealed from the plaintiff. Daniel Jennings admits in his testimony that some years prior to 1879, while prospecting, he discovered some "float" upon the mountain side some four or five hundred feet from where the Sylvanite was afterwards discovered, and that he stuck a stake there to indicate the locality, with a view of re-

turning at some future day to prospect for the vein from which it came, but that he never did return to renew his search until 1879. Other witnesses testify to substantially the same admission on his part. At the worst, this was but a neglect upon his part to pursue a search that might have terminated beneficially to the copartnership. His failure to do so, however, does not appear to have been fraudulent. It is not shown that at the time he stuck the stake where he found the "float," that he discovered the vein from which it came, or that he had any knowledge respecting it that would render his failure to make further search for the mine fraudulent. Such and other indications of the existence of mineral veins are frequent in the path of the prospector. All that can be required of him is that he pursue his search with diligence and good faith. His failure to follow up a particular "float," or other indication of a lode, is not a fraud as of course. It will not do to say, under the circumstances of this case, that Jennings, after the dissolution of the copartnership, could not return to and prospect in Elk Mountain district for other lodes, except at the peril of having to yield to plaintiff a one-third interest in their discoveries, upon the proposition that by proper diligence they might have discovered such lodes during the existence of the copartnership. The evidence does not show the fraudulent concealment of a discovery, as in the case of the other group of mines.

In so far, therefore, as the decree of the court below was based upon the rights of the plaintiff to recover one-third of the proceeds arising from the sale of these three mines, we do not think it justified by the evidence. * * *

The decree of the court below is reversed, and the cause remanded.

LATTA v. KILBOURN.

(Supreme Court of the United States, 1893. 150 U. S. 524, 14 Sup. Ct. 201, 37 L. Ed. 1169.)

Bill by appellees, Kilbourn and Olmstead, as members of a dissolved partnership, against appellant, Latta, another member thereof, for an account of profits made by the latter in certain transactions alleged to have been within the scope of the partnership business, and which, as claimed, it was his duty to have conducted for the benefit of the firm, instead of for his individual advantage. Kilbourn and Latta had been partners in carrying on business as real estate brokers. Their business was one of agency, and consisted in negotiation and making sales and purchases of real property for others. Afterwards one Olmstead was admitted to the firm, the scope of the partnership business remaining unchanged. During the existence of both firms, each member thereof, with the knowledge of the others, had purchased real estate and other property on his individual account, and no question was ever made of

the right to do so, nor did any partner ever claim that the profits realized from such purchases should be treated as belonging to the partnership or subject to division among its members. By special agreement and as a special venture they had several times bought real estate and property on joint speculation and had divided the profits. During the existence of the firm Latta entered into an agreement with one Stearns by which they undertook to engage in the buying and selling of real estate on joint speculation. These speculations resulted in large profits, and the present action is to compel Latta to account for his share of those profits and share them with his copartners, Olmstead and Kilbourn.

The court below entered a decree requiring Latta to account to his former partners for this share of these profits. From this decree Latta appealed.

JACKSON, J. * * * The court below based its opinion upon two grounds: First, that the scope of the copartnership business and agreement, as alleged in the third paragraph of the bill was established, and that the appellant could not engage in purchases of real estate on his own account or in connection with others, except by the consent of his copartners, without violating the duty and obligation which he owed to his firm; and, secondly, that even if the copartnership did not include the business of buying and selling real estate on partnership account, still the appellant could not employ the knowledge and information acquired in the course of the partnership business in respect to the real estate market in making purchases or transactions for his own benefit.

The general principles on which the court proceeded admit of no question, it being well settled that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot, in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity, without being accountable to his copartners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.

It therefore becomes necessary, in testing the liability of the appellant to account for the profits realized from the transactions with Stearns, to consider and ascertain what was the scope of the partnership agreement in reference to the purchase and sale of real estate. This is the underlying and essential fact on which rests the proper determination of the question whether the appellant, in engaging in

the joint enterprises with Stearns, violated any duty or obligation which he owed to the firm of Kilbourn & Latta. In other words, the question on this branch of the case depends entirely upon this: Were or were not those transactions within the scope of the firm business, in respect to which Latta owed a duty to his firm, or in respect to which he could properly be said to be the agent of the firm?

In his answer, which was called for under oath, Latta positively and in direct terms denied the allegation of the bill that it was ever agreed that the firm should carry on the business of buying and selling real estate, and that at no time was such transaction within the scope of the partnership business.

Under the well-settled rules of equity pleading and practice his answer must be overcome by the testimony of at least two witnesses, or of one witness with corroborating circumstances. The proofs in the present case not only fail to break down his denial on this point, but, on the contrary, affirmatively establish that neither under the first nor the second firm of Kilbourn & Latta did the partnership agreement extend to the business of buying and selling real estate either for investment or for speculation on firm account. Neither of the appellees testified to the contrary. The appellee Kilbourn, when pressed upon the question, evaded a reply thereto; and Olmstead, in his sworn testimony, failed to support the allegation of the bill as made on that particular subject. On the other hand, the testimony of the appellant fully supported the denial of his answer, and he is corroborated by all the facts and circumstances in the case, such as the character of the business as advertised and as actually conducted. The well-known characteristics of "real estate and note brokers," indicating, as the words imply, those engaged in negotiating the sale and purchase of real property for the account of others, afford a presumptive limitation upon the scope of the business, such as the appellant asserted and testified to in this case. His sworn answer and testimony on this point has not been overcome by the vague and equivocal testimony of the appellees. The court below was in error in finding as a matter of fact that the partnership extended to the buying and selling of real estate for the account of the firm. There is, therefore, no right on the part of the complainants to relief in this cause, based upon the consideration that the scope and character of the partnership business embraced the purchase and sale of real estate, either for the firm alone or jointly with others.

The further allegation of the bill "that all profits resulting from operations in real estate by any member of the firm of Kilbourn & Latta during the existence of said partnership should belong to said firm, and be entered upon the books of the firm, and be paid into the partnership account, and that no member of said firm should engage in the business of buying and selling real estate in the said District on his own account, or with any other person or persons, except in cases where the proposed transaction had been explained to the said firm.

and the firm had declined to take any part therein," was also positively denied by the answer of the appellant under oath. There is no testimony in the cause to overcome that denial. On the contrary, the evidence establishes that there was no such restriction or limitation imposed upon the individual members. So that the complainants were entitled to no relief on that ground.

But, aside from the foregoing questions of fact, how stands the case on the assumption that there was a new stipulation or agreement when Olmstead was taken into the firm (as claimed by Kilbourn and Olmstead, and as set out above) that knowledge and information obtained by any member of the firm as to bargains in real estate should be first communicated to the firm, with the view of giving the firm, or the members thereof, the first opportunity of purchasing, before any individual member thereof could act upon such knowledge or information for his own benefit? Can the agreement to furnish information as to bargains in real estate, and give copartners the option of taking benefit of such bargains, be considered as so enlarging the scope of the partnership business as to include therein the purchase and sale of real estate on joint account? It would be a perversion of language and a confusion of ideas to treat such a stipulation, if it were clearly established, as creating a partnership in future options to buy what did not already, by the terms of the copartnership, come within the scope and character of the partnership business. That alleged stipulation, instead of enlarging the partnership business, was manifestly a restriction and limitation upon the power and authority of the copartners to bind the firm, or the members thereof, in any real estate transaction, until each member had expressly consented or agreed to join in the particular purchase, specially submitted for consideration.

By the well-settled law of partnership each member of the firm is both a principal and an agent to represent and bind the firm and his associate partners in dealings and transactions within the scope of the copartnership. No express authority is necessary to confer this agency or fiduciary relation in respect to the business of the firm. If the buying and selling of real estate was a part of the business of Kilbourn & Latta, the alleged stipulation about giving an option to the firm and the members thereof to accept special bargains would have been an idle arrangement. But under the alleged stipulation each and every purchase of real estate was a special and individual transaction or enterprise, requiring the special assent and agreement of each partner thereto, before it became a subject of partnership, or was brought within the scope of the partnership business. Under the operation of the agreement, a partner who purchased real estate, either on joint or partnership account, did so not under or by virtue of the partnership articles, or under authority derived from the partnership business and his implied agency to represent the firm therein, but solely and exclusively from the special assent or agreement of his associates to engage in that particular purchase. So that each parcel of real estate

to be acquired, as well as the agreement to purchase the same, was first made the subject of a special arrangement. It is difficult to understand how, under such circumstances and conditions, a copartnership could properly be said to include or extend to the business of purchasing and selling real estate.

The special subject of each purchase, as admitted by Kilbourn, like the purchase of bonds and other securities, did not and could not come within the operation of the copartnership, or become a part of the partnership agreement until each particular piece of property had been selected and agreed upon. It is undoubtedly true that, under this alleged agreement, if a partner had submitted to the firm or his associates the question of buying a particular parcel of land, and they had agreed to make that purchase, he would thereafter have occupied an agency or fiduciary relation in respect to that particular piece of property. But the question here is whether his failure to give the firm, or his copartners, the opportunity of making an election to buy certain real estate, and his making the purchase thereof for his own account, or jointly with another, is such a violation of his fiduciary relations to the firm and his associates in respect to copartnership business as to entitle the latter to call him to account for profits realized in such transactions. In other words, will the violation of his undertaking to give to the firm, or his associates, the opportunity or option to engage in any particular transaction, not within the scope of the firm's business, entitle the copartners to convert him into a constructive trustee in respect to the profits realized therefrom?

That the members of the firm, prior to 1871, or after that date, by special agreement, made purchases of particular parcels of real estate on speculation or for investment, did not make such speculative transactions a part of the partnership business so as to invest either partner with the implied authority to engage therein on account of the firm. The name of the firm was never, in fact, used in such special ventures, which no partner had authority to enter into except and until the consent of the others had been specifically obtained so to do, each instance of buying on firm or joint account being the subject of a separate, special and distinct agreement.

It may be said of any and every partnership, irrespective of its regular business, that by consent of all the members other matters beyond the scope of the partnership may become the subject of investment or speculation on joint account; but such special transactions cannot properly be said to come within the scope of the partnership. The very fact that the express consent of each partner was required in order to engage in such special ventures goes clearly to show that the transactions were not within the scope of the partnership, for, if they were, special consent could not be required as a condition precedent for engaging therein.

Matters within the scope of the partnership are regulated and controlled by a majority of the partners, but by the alleged stipulation

under consideration a single member of the firm could control the firm's action in respect to purchases of real estate. This is inconsistent with the idea that the business of the firm extended to such purchases.

Again, the alleged agreement does not provide how such future acquisitions as might be specially selected or agreed upon for speculation or for investment were to be paid for, or in what proportion the several partners should be interested therein. Neither does it distinctly appear from the allegations of the bill, nor from the testimony of the appellees, whether, in acting upon information given, the special purchases were to be made for the account of the partnership or for the account of the several members of the firm. The methods of keeping the accounts of such transactions in the name of the individual members rather than in the name of the firm would indicate that such purchases were for the benefit of the separate partners rather than for the firm.

There is no allegation in the bill, nor any direct statement in the testimony of the appellees, that if the information had been given as to the Stearns transactions, either the firm or themselves would have exercised the option of engaging therein upon the conditions of allowing Stearns to determine "when, at what price, and on what terms any portion of the real estate might be sold." Neither is it alleged in the bill, nor shown by the proofs, that the appellant in any way neglected the partnership business, nor that the firm and his copartners sustained any damage whatever from the transactions. On the contrary, it is shown that from the purchases and sales of the property bought on joint account with Stearns the firm derived its regular commissions.

This alleged new stipulation amounts, if it has any legal force and operation, simply to an agreement for a future partnership, or the joint acquisition of such special properties as might by mutual and unanimous consent be considered as holding out a prospect of profitable speculation; and at most could only be regarded as an agreement for a future partnership in respect to such properties as might be specially selected for speculation. It is well settled in such cases that no partnership takes place until the contemplated event actually occurs. It stands upon the same principle as an option to become a partner, which creates no partnership until the option is actually exercised.

If the stipulation in question could be construed into an agreement that no partner should engage in the buying and selling of real estate on his own account, would that entitle the other members of the firm to share in the profits that Latta made in real estate speculations without having first secured the consent of his copartners to his engaging therein? No such proposition can be sustained.

In Murrell v. Murrell, 33 La. Ann. 1233, it was held that a partner who, in violation of the act of partnership, enters into another firm, does not thereby give the right to his original copartner to claim a share in the profits of the new firm. The violation of the agreement may give rise to an action for damages, but, inasmuch as the original

copartner could not be held, without his consent, for the debts of the new firm, he cannot claim to be made a partner therein.

In Dean v. Macdowell, 8 Ch. Div. 345, one of the stipulations in the articles of copartnership was that "said C. A. MacDowell should diligently and faithfully employ himself in and about the business of the partnership, and carry on and conduct the same to the greatest advantage of the partnership," and by another article it was stipulated that neither partner should "either alone or with another person, either directly or indirectly, engage in any trade or business except upon the account and for the benefit of the partnership." The business of the firm was to deal as merchants and brokers in selling the produce of salt works on commission, and during its existence Macdowell clandestinely purchased a share in a firm of salt manufacturers. A bill was filed by the other partner for an account of the profits realized in the new business, and it was held by the master of the rolls that the bill could not be sustained. On appeal this judgment was affirmed. Lord Justice James, after stating the general principles of partnership law, said: "The business which the defendant has entered into was the business of manufacturing salt, which was to be the subject-matter of the trade of the first firm. If in that he had in any way deprived the firm of any profits they otherwise would have made, if by his joining in the partnership for the manufacture he had diverted the trade from the firm in which he was a partner to some other firm, I can see that that would be a breach of his duty; but it is not pretended or alleged that any alteration took place in the business of the firm by reason of his having become a partner in the other business. It is not pretended that there was any alteration in the commission or anything else. Everything remained exactly as it was, so that it cannot be suggested that there was a farthing's worth of actual damages done to the original firm by reason of his having become a partner in the works which produced the articles in which the firm traded. Under these circumstances it seems to me that we cannot say it was a benefit arising out of his partnership. It was not a benefit derived from his connection with the partnership, or a benefit in respect of which he was in a fiduciary relation to the partnership. He was only in a fiduciary relation to the partnership in this respect, namely, the same as a covenantor is with regard to any other covenantee in respect of any other covenant which is broken. It was a partner entering into a covenant with a partner; still it was simply a covenant that he would not do something which would result in damage. But it was not a covenant, in my view, which was in any way connected with the fiduciary relations between the parties. That being so, it seems to me that the master of the rolls was right in saying that you cannot extend the cases with regard to a share in the profits to a case in which, as between these parties, there was really nothing but a breach of covenant, which breach in truth did not result and could not have resulted in a farthing's worth of loss to

the partnership, unless, indeed, it could lead to this: That the man was neglecting his business, devoting himself to the other business, and employing his time and attention and mind in it, and diverting himself from the business in which he was engaged." These views, which were concurred in by the other members of the court, are directly in point in the present case, which, in principle, cannot be distinguished from the case there under consideration.

We are clearly of opinion that the alleged new stipulation that each copartner should furnish to the firm, or to the members thereof, information as to bargains in real estate, and give it or them the option to engage in the acquisition thereof before acting upon such information for his own benefit, neither enlarged the scope of the partnership so as to make it include the purchases and sales of real estate, nor precluded any member of the firm from making purchases on his own account or jointly with others; and that the act of the appellant in purchasing property with Stearns was no such a violation of his duty and obligation to the firm of Kilbourn & Latta, or to the members thereof, as to entitle the appellees to share in the profits which he realized therefrom.

In respect to the second ground, on which the court below rested its judgment, that the appellant could not take advantage of the skill, knowledge, and information as to the real estate market acquired in the course of his connection with the partnership of Kilbourn & Latta, so as to gain any profit individually therefrom, but was bound to share with his copartners all the beneficial results which could be derived from his knowledge or information on that subject, we need not do more than to say that this proposition is wholly unsupported either by the authorities or by any legal principle applicable to partnership law.

It is well settled that a partner may traffic outside of the scope of the firm's business for his own benefit and advantage, and without going into the authorities it is sufficient to cite the thoroughly considered case of Aas v. Benham [1891] 2 Ch. 244, 255, in which it was sought to make one partner accountable for profits realized from another business, on the ground that he availed himself of information obtained by him in the course of his partnership business, or by reason of his connection with the firm, to secure individual advantage in the new enterprise. It was there laid down by Lord Justice Lindley that if a member of a partnership firm avails himself of information obtained by him in the course of the transaction of the partnership business, or by reason of his connection with the firm, for any purpose within the scope of the partnership business, or for any purpose which would compete with the partnership business, he is liable to account to the firm for any benefit he may have obtained from the use of such information; but if he uses the information for purposes which are wholly without the scope of the partnership business, and not competing with it, the firm is not entitled to an account of such benefits.

It was further laid down in that case, in explanation of what was said by Lord Justice Cotton in Dean v. Macdowell, ubi supra, that "it is not the source of the information, but the use to which it is applied, which is important in such matters. To hold that a partner can never derive any personal benefits from information which he obtains as a partner would be manifestly absurd." And it was said by Lord Justice Bowen that the character of information acquired from the partnership transaction, or from connection with the firm, which the partner might not use for his private advantage, is such information as belongs to the partnership in the sense of property which is valuable to the partnership, and in which it has a vested right.

Tested by these principles, it cannot be properly said that Latta used any information which was partnership property, so as to render him chargeable with the profits made therefrom. His knowledge of the real estate market, or in respect to profitable investments therein, was not used in competition with the business of the firm, nor in any manner so as to come within the scope of the firm's business.

The points already considered being sufficient to dispose of the case, we do not deem it necessary to go into the other question discussed as to whether a parol partnership in respect to purchasing and selling real estate, or an agreement between copartners to give each other the option of engaging in such purchases, would come within the operation of the statute of frauds.

We are clearly of opinion, upon the whole case, that the decree should be reversed, and the cause remanded to the court below with directions to dismiss the bill at the costs of the appellees.

SECTION 2.—RIGHTS AND DUTIES AS TO THE CONDUCT OF THE BUSINESS.

KATZ v. BREWINGTON.

(Court of Appeals of Maryland, 1889. 71 Md. 79, 20 Atl. 139.)

Charles Brewington filed a bill of complaint against Louis Katz, alleging that in May, 1887, they had entered into a copartnership under the name of L. Katz & Co., and that the business had been carried on under the firm name until the time of the filing of the bill. It was further charged that the books of the firm were in the possession and control of Louis Katz, who refused to permit complainant to have access to the same, and that Katz had sole control and possession of the goods of the firm, and was disposing of the same in fraud of complainant; that complainant no longer felt safe with the books and assets of said firm in the possession of said Katz, and desired

that said copartnership should be wound up under the order and direction of this court; that Katz absolutely excluded complainant from all control of the business, and refused to give him any information in regard to the business of the firm, having carried the books of the firm away from the place of business of said firm, and refused to disclose the place where said books were deposited. * * * The court ordered an injunction, and set down for hearing the application for a receiver, directing that notice should be given to the defendant. The notice was not served in due time, but nevertheless the parties appeared in court, by counsel, on the day appointed for the hearing; and, after the court had heard their statements on the bill and exhibit, it appointed a receiver. After the appointment of a receiver, an answer was filed by defendant, and an appeal was taken.

BRYAN, J. We are, of course, on this appeal, confined to the statements of the bill of complaint. The defendant might have objected to the motion for a receiver on the ground that he had not received the required notice, but he does not appear to have done so. If he had filed his answer before the hearing it would have been considered both in the court below and in this court. The time appointed for the continuance of the partnership had expired before the filing of the bill of complaint, and it was then existing only by the mutual consent of partners. The agreement of partnership required Katz to furnish all the capital, and the profits were to be equally divided after payment of debts and expenses. It was not alleged by complainant that any profits had been made, or that there were any debts due by the partnership. It was, however, alleged that the defendant had excluded him from all control of the business of the firm, and had refused to give him any information respecting it, and had carried away the books from the place of business, and had refused to disclose the place in which they were. Each partner has an equal right to take part in the management of the business of the firm. Although one of them may have an interest only in the profits, and not in the capital, yet his rights are involved in the proper conduct of the affairs of the firm, so that profits may be made. So each partner has an equal right to information about the partnership affairs, and to free access to its books. The complainant had a right to learn from the books whether there were profits, and whether there were debts. If he were denied this information, as charged in his bill of complaint, a sufficient reason appears for not alleging that profits had been earned, and that debts existed. In Const v. Harris, 1 Turn. & R. 496, Lord Eldon said: "The most prominent point, in which the court acts, in appointing a receiver of a partnership concern, is the circumstance of one partner having taken upon himself the power to exclude another partner from as full a share in the management of the partnership as he who assumes that power himself enjoys." This principle seems to be universally approved by the authorities. It is decisive of the present question. The order must be affirmed.

LINDSEY v. STRANAHAN.

(Supreme Court of Pennsylvania, 1889. 129 Pa. 635, 18 Atl. 524.)

PER CURIAM. There is but a single question in this case: Is J. R. Lindsey, the plaintiff, entitled to compensation for his services as a partner? It is conceded that there was no express contract that he should be paid for such services, and there is no principle better settled than that the law will not imply a contract in such cases. The reason is that the partner is but attending to his own affairs. This rule is inexorable; as much so as that between parent and child. Were it otherwise, we might have a contract between the partners upon the settlement of every partnership account as to the value of their respective services. It is true this principle may work hardship in particular cases—almost every general rule does; but that is a weak argument against the soundness of the rule. When the copartnership agreement contemplates that one partner shall manage the business, or do more than his share of the work, it is easy to provide for his compensation in the agreement itself; and if no such stipulation is then made, as before said, the law will not imply one. Even where a liquidating or surviving partner settles up the business, it has been repeatedly held that he is not entitled to compensation for doing so, although, in such case, he performs all the services. Beatty v. Wray, 19 Pa. 516, 57 Am. Dec. 677; Brown v. McFarland, 41 Pa. 129, 80 Am. Dec. 598; Gyger's Appeal, 62 Pa. 73, 1 Am. Rep. 382; Brown's Appeal, 89 Pa. 139. Judgment affirmed.

THAYER v. BADGER.

(Supreme Judicial Court of Massachusetts, 1898. 171 Mass. 279, 50 N. E. 541.)

Contract, by the surviving partner of the firm of Hayden & Thayer, to recover a balance alleged to be due from the defendant, as administrator of the estate of his deceased partner, on the settlement of the firm's affairs. The case was submitted to an auditor, and the sole question was whether the plaintiff had a right to pay a commission to the new firm of Thayer, Owen & Tyler, of which he was a member, for selling the property of the firm of Hayden & Thayer in liquidation. The auditor found "as a fact that the method adopted by the surviving partner in disposing of the merchandise of the old firm in the course of the settlement of the affairs of that firm was a prudent and reasonable one, that the charge for selling merchandise made by the new firm was a reasonable one, and ruled as matter of law that there was no objection under the circumstances to the charge of $650 commission made by the firm of Thayer, Owen & Tyler for selling the merchandise of the firm of Hayden & Thayer in liquidation." At the

trial in the superior court, on the auditor's report alone, without a jury, before Hardy, J., the defendant asked a ruling that the surviving partner had no right to make any charge for winding up the affairs of the late firm, and therefore had no right to turn over the merchandise of the firm of Hayden & Thayer to be sold by the firm of which he was a member on commission, and that the sum charged by such firm as a commission for making the sale, or at least that portion of such commission which the surviving partner was entitled to as a member of said new firm, ought not to have been charged in the account. The judge declined so to rule, adopted the findings of the auditor, and found for the plaintiff; and the defendant alleged exceptions. The judge reported the case for the determination of this court. If the ruling was right, the finding was to stand; if wrong, a new trial was to be granted.

Holmes, J. The only question in this case is whether the judge below was bound to rule as matter of law that a surviving partner has no right to turn over merchandise of the late firm to a new firm of which he is a member, to be sold upon commission by the latter; and that the commission charged, or at least the surviving partner's share, should not be allowed in the account between him and the executor of his deceased partner. In this case the auditor has found that the course adopted was prudent and reasonable, and the charge reasonable. Whether we should have made the same findings we cannot tell, but, they having been made, and we being bound by them, we are not disposed to go so far as to say that it is impossible that the charge should have been justified by the saving to the old firm and the trouble to the new from the arrangement. It is true, no doubt, that there is a disinclination to allow pay to a surviving partner for winding up (Dunlap v. Watson, 124 Mass. 305), but the tendency is to deal with such questions on their particular circumstances, rather than by absolute rules. Turnbull v. Pomeroy, 140 Mass. 117, 118, 3 N. E. 15; Robinson v. Simmons, 146 Mass. 167, 176, 15 N. E. 558, 4 Am. St. Rep. 299.

Findings to stand.

SECTION 3.—INDEMNITY AND CONTRIBUTION.

DOWNS v. JACKSON.

(Supreme Court of Illinois, 1864. 33 Ill. 465, 85 Am. Dec. 289.)

Beckwith, J. This was a bill in chancery for contribution and set-off. The parties were partners, sharing profits and losses equally in the manufacture and sale of furniture for one year, ending November 22, 1860, when the copartnership was dissolved, and the plain-

tiff in error bought the interest of the defendant in error in certain furniture belonging to the firm, and gave his notes therefor, a part of which were paid, but upon the remainder there was due at the commencement of the suit about $200. At the time of said dissolution the firm was indebted to Roundy, Chabin & Co. in the sum of about $400, upon which indebtedness a judgment was rendered in April, 1861. An execution was afterwards isssued thereon and satisfied by a sale en masse of certain lands belonging to the parties severally. On the 1st day of January, 1862, the plaintiff in error redeemed from the sale by paying to the purchaser the amount of his bid, with interest, for which he gave a receipt upon the back of the certificate of sale, which he delivered to the plaintiff in error. In the spring of 1863 the parties had a settlement of all their copartnership matters, except the claim of the plaintiff in error to be repaid one-half of the amount paid by him to redeem said lands and the balance due upon said notes. The plaintiff in error by the present suit seeks contribution for a moiety of the sum paid by him and a set-off of the same against the amount due upon his notes. The liability of the parties to Roundy, Chabin & Co. was a joint one, and it was the duty of each party to exonerate the other from a moiety of it. No act falling short of a complete exoneration of the one party and his property from so much of the liability as he was entitled to be exonerated from will operate as a discharge of the other party from his obligation in that regard. The sale en masse of the lands of the defendant in error with those of the plaintiff in error did not discharge any part of the property sold, nor the parties from their respective duties. Neither party could obtain a discharge of his property without paying the whole amount of the purchase money and interest, and each of them had the same right after the sale, within the time allowed by law, to redeem the lands for that purpose as he had before that time to pay the debt to discharge himself from personal liability. The sale may have been irregular, and for that reason might have been set aside; but setting aside the sale would have revived the debt, and we are unable to discover any satisfactory reason for requiring the plaintiff in error to make the charge upon his property a personal debt against the defendant in error and himself before satisfying it. The law does not require acts to be done where there is no conceivable object to be gained by doing them. In the present case the right to contribution is founded upon the duty of exoneration. The plaintiff in error has been compelled to pay money to exonerate his property from a liability, a moiety of which he ought to have been exonerated from by the defendant in error. The lands were discharged from the sale by the purchasers accepting the redemption money. The statute, providing a mode of evidencing the redemption, may be enforced by an appropriate remedy; but a compliance with its provisions is not a condition precedent to the assertion of the right of plaintiff in error to contribution. The court below should have rendered a decree in

favor of the plaintiff in error for the one-half of the sums paid by him, with interest thereon from the time of its payment. The plaintiff in error was not entitled to the set-off claimed by the bill. There was no proof of the insolvency of the defendant in error, nor of any special equity requiring the set-off to be made. * * *

The decree of the court below will be reversed, and the cause remanded.

Decree reversed.

MURPHY v. CRAFTS.

(Supreme Court of Louisiana, 1858. 13 La. Ann. 519, 71 Am. Dec. 519.)

LAND, J. The plaintiff and defendant were commercial partners, transacting a general commission business under the name and style of Murphy & Crafts in the city of New Orleans. Their contract of partnership was in writing, and the third article thereof was in these words: "We will not indorse any note, draft, or give our signature separately or collectively, except for our legitimate business purposes." Crafts, in violation of this article of the partnership agreement, accepted in the partnership name, for the accommodation of his brother-in-law, John C. Robertson, of the city of Boston, bills of exchange to the amount of $12,500. Robertson failed in business, and the firm of Murphy & Crafts lost, in consequence of these acceptances, the sum of $5,592.90. The principal question in this case is whether Crafts is liable to his partner for the loss. * * *

Judge Story, in his Commentaries on the Law of Partnership, says: "One of the most obvious duties and obligations of all the partners is strictly to conform themselves to all the stipulations contained in the partnership articles, and also to keep within the bounds and limitations of the rights, powers, authorities, and acts belonging and appropriate to the due discharge of the partnership, trade, or business. Of course, every known deviation from, and every excess in, the exercise of such rights, powers, authorities, and acts, which produce any loss or injury to the partnership, are to that extent to be borne by the partner who causes or occasions the loss or injury, and he is bound to indemnify the other partners therefor. The same doctrine is recognized by Pothier as existing in the French law; and it seems, indeed, so clearly the result of natural justice as to require no particular exposition." See Story on Part. § 173.

According to these rules, the defendant is clearly bound to indemnify the plaintiff for the loss resulting from his breach of the third article of their contract of partnership, unless the same was superseded or waived in the course of their business with the assent of the plaintiff. And this is the defense made by the defendant to the action; but we concur with the district judge that the evidence is insufficient to show

that the partners came to a new arrangement in the course of their business, and thereby superseded article 3 of their contract, or that the plaintiff ratified the acceptance in favor of Robertson.

Judgment affirmed.

CHARLTON v. SLOAN.

(Supreme Court of Iowa, 1888. 76 Iowa, 288, 41 N. W. 303.)

Action in chancery to dissolve a partnership and to settle its affairs. A decree to that effect was entered, and provision was made for the division of the assets of the firm.

Beck, J. The petition alleges that plaintiff and defendant, under a written agreement, entered into a copartnership for the sale of jewelry, books, stationery, etc. The contract is set out by copy as an exhibit to the petition. It is shown that plaintiff paid into the concern cash or its equivalent equaling the amount of the stock he was required to pay under the contract. It is alleged and charged that defendant, with the dishonest intention to defraud plaintiff, made false and "blind" entries in the books of the firm, and drew out and misapplied the money of the firm, and failed to charge himself with money appropriated to his own use, and in other matters acted dishonestly. It is also alleged that defendant, during plaintiff's absence, and without his knowledge and consent, leased at a large rent a new storeroom, and thereby lost the trade and good will of the business connected with the old stand, and that this was done after plaintiff had suggested to defendant that the business of the firm ought to be closed up, in which defendant concurred, and agreed that it should be done. It is shown that the lease cannot be disposed of or surrendered except at a loss of $1,600. It is alleged in the petition that defendant is indebted to plaintiff, on account of the business of the partnership, in the sum of $5,000, and that defendant is in poor health, and for that reason is incapable of managing the business of the firm. A receiver was appointed, who proceeded under the direction of the court to manage the affairs of the partnership. The defendant denies the charges of fraud, and dishonest and unfaithful management of the firm's business, and declares that he is ready and willing, and now offers, to settle the partnership business, and to account for all sums received by him from the firm, and that plaintiff has refused to settle unless defendant would pay $1,600, the alleged loss arising from the lease of the new storeroom. * * *

In our opinion the evidence fails to support the charge of bad faith and dishonesty made by plaintiff in the petition against defendant; and we think it is not shown that defendant wrongfully withheld from the partnership any money or property to which it was entitled. It may be that the new storeroom was unwisely rented by defendant,

but the act was not wanton or fraudulent, or done with any improper motive, which would render him liable to make good to the firm or to his partner the loss resulting therefrom. * * *

We reach the conclusion that the decree of the district court ought to be affirmed.

YORKS v. TOZER.

(Supreme Court of Minnesota, 1894. 59 Minn. 78, 60 N. W. 846, 28 L. R. A. 86, 50 Am. St. Rep. 395.)

Action by Thomas J. Yorks against David Tozer for an accounting between plaintiff and defendant, as partners, and to recover money paid under the partnership agreement. Judgment for plaintiff, and defendant appeals.

CANTY, J. It is conceded by both parties, and found by the court, that the plaintiff and defendant were partners in the purchase of a tract of land; that it was agreed by and between them that the title should be taken in the name of defendant; that he should advance the purchase price, and pay the taxes, and plaintiff should sell the land, and, after repaying defendant the money so advanced by him and 7 per cent. interest thereon, the balance of the proceeds of such sale should be divided equally between them. The land was so purchased April 23, 1883, for $450, and the title so taken. The land was sold and conveyed by defendant August 6, 1890, for $1,560. Said purchase money and the taxes paid by defendant, and interest on all of the same up to the time of said sale, amount to $807.32, leaving $752.68, the balance of the proceeds of said sale, so to be divided between them. This action is brought for an accounting and a recovery of the sum due plaintiff under said agreement, and the trial court awarded plaintiff one-half of said balance of $752.68, and from the judgment entered thereon defendant appeals. There is no settled case, and the error assigned is that the judgment is not sustained by the findings of fact.

The court further finds that in July, 1890, without the knowledge of plaintiff, defendant negotiated a sale of said land to said purchaser; that the purchaser procured an abstract of title to said real estate from the register of deeds; that said abstract was in fact false, as it omitted one recorded conveyance, a link in the chain of title, and by such abstract it appeared that the original patentee was still the owner in fee of the land, whereas in fact defendant had a good title of record; that the purchaser submitted the abstract to two different and competent attorneys, who each advised him that, according to the abstract, the defendant had no title, and defendant was informed by such purchaser of the opinion of said attorneys. Defendant, believing he had no title, at an expense of $526, then procured a conveyance to himself from said original patentee, and claims that this expense

should be allowed him in said accounting as a part of the cost of the land to be deducted from such proceeds of said sale, and that plaintiff is entitled to only one-half of the balance of such proceeds, after this $526 is also deducted therefrom. It is further found by the court that defendant did not inform plaintiff of any of said negotiations, or of the apparent defect in said title, or show him or inform him of said abstract, or consult him as to purchasing the supposed title of said patentee, and that plaintiff had no knowledge or notice of any of these things, or of the sale of said property to said purchaser from defendant, until after the deed thereof was recorded, and he discovered it by an examination of the records; "that had said defendant exhibited said abstract of title to said plaintiff, or informed him in what respect said title of said defendant was claimed to be defective, said plaintiff could at once have informed said defendant that said abstract was not a true and correct abstract of title to said lands;" and "that plaintiff was not in any manner ever consulted by defendant in regard to said supposed defect of title." The court further finds that defendant acted in good faith in the sale of the land, and in expending said sum of $526 in attempting to cure the supposed defect in his title, but holds that he cannot compel plaintiff to stand one-half or any part of such expense. We are of the same opinion. If defendant did not act in bad faith, he was, to say the least, grossly negligent. It does not appear that the plaintiff was not accessible and could not be communicated with in a reasonable time. This land was the only partnership property, and its purchase and sale was the only partnership business. It was not an act in the usual course of the partnership business, but one which went to the very foundation of the partnership. It is found by the court that the plaintiff, and not the defendant, conducted the negotiations for the purchase of this land, and procured the conveyance to defendant; and he should be presumed to have had some knowledge of the state of the title. No reason is given by defendant why all the negotiations for the sale of the land and the purchase of this supposed title by him were kept secret from plaintiff. In every important exigency the partner about to act should consult the other partner, at least if there are no circumstances which excuse him from so doing. The order appealed from should be affirmed.

WARRING v. ARTHUR et al.

(Court of Appeals of Kentucky, 1895. 98 Ky. 34, 32 S. W. 221.)

Eastin, J. This action was brought by appellant in the Bell circuit court, alleging the existence of a partnership between himself and appellees, and seeking to enforce an alleged right of contribution from appellees of certain sums which he claimed to have paid in excess of his proportion of the partnership indebtedness. It is charged in the

petition that this partnership relation arose by operation of law out of the fact that appellant and some of the appellees had, in the year 1890, signed articles of incorporation, and undertaken to organize a corporation in the town of Middlesborough, under chapter 56 of the General Statutes of Kentucky, and that all of the appellees had subscribed for and become the owners of stock in this proposed corporation, which had never, in fact or in law, become a corporation, by reason of the failure of the projectors thereof to comply substantially with the requirements of the statute regulating the formation of corporations in Kentucky. It is alleged, however, that this abortive corporation commenced business and incurred liabilities which it was unable to pay, and that, the defects in its organization being discovered, and the fact that it had no legal corporate existence becoming known to some of its creditors, suits were brought against appellant to charge him individually, as one of the incorporators and stockholders thereof, and that he had thus been compelled to pay on its account the sum of $1,327.68. It is further alleged that by reason of the failure to become legally incorporated the relation between appellant and his associates became that of partners, and that they all became equally liable to creditors for said indebtedness, and that he was entitled to contribution from the others for their respective proportions of the amount paid by him individually. It is stated, however, that of his several associates only two, to wit, the appellees John M. Brooks and R. H. Fox, were, at the time of the filing of the petition, either solvent, or within the jurisdiction of the court, and appellant therefore asked that they be required to contribute equally with him the amount he had so paid out, and asked judgment against each of them for an amount equal to one-third thereof, or $442.56. To this petition a general demurrer was sustained by the court, and, leave being given to amend, appellant, at a subsequent term of the court, filed an amended petition, in which he alleged for the first time that the company or partnership referred to in his original petition was insolvent at the time of the filing thereof; that it never had any invested capital; that its business had been done on credit; that it had long since ceased to do business; that all the property it ever had had been sold by order of court; that from the time of the attempted organization it had been insolvent, and had long since been dissolved. To the petition as thus amended appellees Fox and Brooks again demurred, but, their demurrers being overruled, they excepted, and were given time to answer. Separate answers were afterwards filed by these appellees, to which appellant filed replies, and also general and special demurrers, which were not then passed upon by the court, and separate rejoinders were then filed by Fox and Brooks, thus making up the issues on the pleadings. Appellant testified in his own behalf. Brooks gave his disposition; and a written statement by Fox, which was agreed to be read as his deposition, was filed, and these, with the exhibits attached to them, constituted the evidence heard upon the trial. Upon the hear-

ing the court below overruled the demurrers filed by appellant to the answers of Brooks and Fox, respectively, but on the merits adjudged that appellant take nothing by his petition, and dismissed the same with costs, to all of which appellant excepted, and prayed an appeal.

The record before us presents some questions of more than ordinary interest, especially that arising on the merits of the case as prepared, and pertaining to the mutual obligations to each other of parties standing in the relation of the parties to this action; but, interesting as a consideration of that question might be, it is unnecessary, in our view of the case, and the decision of the court will be based entirely upon the sufficiency of appellant's petition to sustain the action against appellees. It is to be observed that the liability sought to be fixed by appellant on appellees is that of partners. The very foundation of the cause of action rests upon the assumption that the failure of these parties to pursue substantially the course pointed out in and required by the statute for the organization of a corporation made them partners in this business, and, a partnership being thus established by operation of law, this action for contribution as between partners was brought to charge each with his proportion of what one member thereof had been compelled to pay on account of partnership liabilities. Yet it is nowhere alleged in the petition as amended, nor is it anywhere claimed in the case, that there had ever been any settlement of the partnership accounts, or any accounting between the parties, whereby a balance had been struck, or whereby the appellees were found to be indebted to the firm in any sum on final settlement. That this is, as a general rule, necessary in order to enable one partner to maintain an action of this kind against his copartners, is too well settled to require discussion. Where the transaction out of which the liability arises is independent of or outside of the partnership business, or where the partnership covers a single venture, or but one transaction, so that no accounting is necessary, the rule is perhaps different; but in a business such as the one under consideration here, covering a variety of transactions, we know of no exception to the rule as above stated. This rule is recognized by this court in the cases of Lawrence v. Clark, 9 Dana, 259, 35 Am. Dec. 133, Shearer v. Francis (Ky.) 5 S. W. 559, and Stone v. Mattingly (Ky.) 19 S. W. 402, and may be said to be fundamental as to the right of one partner to sue his copartner. It is true that this action was brought in equity, and that the petition contains a prayer for all general relief; but it does not ask for a settlement of the partnership accounts, or for a winding up of its affairs. It does state that the partnership is insolvent, but it nowhere says anything as to the nature or amount of its indebtedness; and while it alleges that appellant has made these payments for it, it takes no account of the fact that other members of the firm may also have paid out money for it, as Brooks in his testimony swears that he has done. And this shows the importance of the rule referred to, for how could this one partner have known the state of the account be-

tween this firm and each of the other partners when there had been no settlement of the partnership accounts, and how unreasonable it would be to allow him to maintain an action against each of the others for their full proportion of what he might have paid without reference to the question as to what they may have paid? In other words, how can there be any fair or just contribution, or any claim to contribution, as between partners, until after a final settlement and ascertainment of the exact state of the account of each partner, and a full settlement of the partnership affairs? Admitting all that is alleged in this petition to be true, it might well be that appellant was entitled to recover nothing from his partners by way of contribution on account of what he had paid, for, as there is no pretense that the partnership accounts have ever been settled, it might appear on such settlement that appellant was still indebted to the partnership in a large sum, and that his partners had actually paid for it much more than he had done. Indeed, this very claim is here made by his partners. It is charged by them that, though he subscribed for stock to the amount of $2,500, yet he has paid for no part of it; and while he claims that it was agreed that he should not pay for it, still Brooks and Fox deny that there was any such agreement. We only refer to this, however, as illustrating the imperative necessity for and the eminent propriety of the rule which forbids that such an action be maintained in the absence of a full settlement of the partnership affairs which will show the exact state of the account between it and every other person, and especially the other members of the firm, so that the claims and demands of the partners, as between themselves, may be known.

Another point to which attention may be called is the fact that this petition fails to state that this alleged partnership was an equal partnership, or that the appellees, Fox and Brooks, who are each asked to contribute equally with appellant, are equally interested with him in the partnership. It appears from the record that appellant subscribed for $2,500 of the stock, while each of the appellees named subscribed for $1,000 of the same. The fact that they were stockholders is the fact relied on for holding them liable as partners. Mr. Lindley, in his work on Partnership, lays it down as a general rule "that partners must contribute ratably to their shares towards the losses and debts of their firm" (2 Lindl. Partn. p. 386); and this, we think, is the accepted doctrine on the subject. Certainly any other rule would be very inequitable in this case, and while we do not care to decide that this must be the basis of recovery in every such case, yet we would call attention to the absence from the petition in this case of any allegation as to the respective interests of the partners among whom this loss is sought to be apportioned. In conclusion, it is clear from the views above expressed that no error was committed by the court below to the prejudice of appellant, and the judgment dismissing his petition with costs is therefore affirmed.

MAGILTON v. STEVENSON et al.

(Supreme Court of Pennsylvania, 1896. 173 Pa. 560, 34 Atl. 235.)

Bill in equity for the dissolution of a partnership and an account. The master to whom the case was referred reported as follows: Whereas, in accordance with the terms of the partnership agreement, Magilton "shall in no event be put to a loss of more than $1,250, and the balance shall be made up and paid to him in case of greater loss by the other partners," the amount contributed by the plaintiff being the sum of $4,670, adding to which the amount advanced by him to the receiver of $100, making a total of $4,770, from which, deducting the amount which it was agreed should represent the maximum loss of the plaintiff of $1,250, leaving a balance of $3,520 which should be paid by the defendants to the plaintiff, and they should be held to be jointly and severally liable to the full payment of the same, together with the costs of the cause, including a suitable allowance for the services of the receiver. Exceptions to the master's report were overruled by the court, which was assigned as error.

FELL, J. The first contention of the appellant is that the decree in this case should not have been entered, as the partnership affairs had not been settled and the plaintiff's loss ascertained. The partnership was formed for the single purpose of constructing waterworks in Mayfield, Ky. The only contribution of capital was that made by the plaintiff. The land on which the works were to have been constructed had been transferred, and the enterprise abandoned, and the business was a total failure. The receiver was unable to obtain a bid for the few articles of personal property found on the premises, and nothing of value came into his possession. The report of the learned master that the remaining property of the partnership was "practically worthless," as explained by the testimony and other parts of his report, is in effect a finding that they were worthless. There were no assets, no accounts to settle, and nothing remained but to adjust the equities between the parties.

The partnership agreement provides that "the profits and losses are to be shared equally by the partners, each being entitled to one-fourth of the profits, and to be liable for one-fourth of the losses; provided, however, that the said Magilton shall in no event be put to a loss more than $1,250, and the balance shall be made up, and paid to him in case of greater loss, by the other parties." The master held that the liability of the defendants to pay the loss of the plaintiff in excess of $1,250 was a joint and several liability. It is conceded that the finding of the master on this point would be correct if the parties stood in the relation of strangers; but it is contended that, in view of their partnership relation, the proviso, read in connection with the contract, imposes a liability on each of the remaining partners to bear only one-third of the plaintiff's loss in excess of $1,250. The

plaintiff furnished the whole cash capital, and the twofold purpose of the proviso was to fix a limit beyond which his loss should not extend, and to secure the repayment by the other partners of the balance of his contribution to the common property. This was done by providing that the balance should be paid to him by them. This is the plain meaning of the words used. In the preceding clause, there is a distinct limitation of individual liability for the general losses of the business; and the omission of this limitation from the proviso is significant, and indicates an intention that each should be liable for the whole in the event of the failure of the others to pay their shares. As the partnership had ended, and the defendants had refused, after demand, to adjust the accounts in accordance with the agreement, we see no error in the allowance of interest. The decree is affirmed, at the cost of the appellant.

SECTION 4.—A PARTNER'S RIGHT TO HAVE FIRM PROPERTY APPLIED TO FIRM DEBTS.

WARREN v. TAYLOR et al.

(Supreme Court of Alabama, 1877. 60 Ala. 218.)

The original bill in this case was filed by John F. Warren against Joseph W. Taylor and Mrs. Mary C. Benagh, and sought a settlement of a partnership which had existed between Warren and Taylor, the foreclosure of a mortgage which Taylor had given to Warren on his interest in the partnership effects, and the adjustment of the conflicting liens of Warren's mortgage and a mortgage owned by Mrs. Benagh. The mortgage by Taylor to Warren was given to secure him against any liability on account of certain bills of exchange, drawn by Taylor, in the firm name, for his personal use, with Warren's consent. The mortgage from Taylor to Mrs. Benagh was also given to secure her for a loan to Taylor for his personal use. Both mortgages were on Taylor's interest in the firm of Taylor & Warren. The mortgage to Mrs. Benagh was recorded some time prior to the mortgage to Warren. The chancellor held that the complainant had no lien as a partner, on account of the said bills of exchange he had been obliged to pay, but must rely only on his mortgage, and that Mrs. Benagh's mortgage, having been first recorded, was entitled to preference over his mortgage. Decree accordingly. Complainant appealed.

STONE, J. Money was borrowed separately from two persons, each transaction having its inception about the same time—January, 1874. The evidence of the indebtedness was in each case renewed from time to time, and mortgages given as security on the same property—the

borrower's interest in the Times newspaper and its property. In the case of Mrs. Benagh's loan, the first mortgage was executed directly to her, on the same date as the loan, January 8, 1874. This mortgage was renewed every three months. In the loan by Fitts & Co., bankers, the bill of Taylor & Warren, partners and joint owners of the Times newspaper, was taken as security, due at a short interval. This debt was increased during the year, and was renewed every 30 days. A mortgage on Taylor's interest in the Times newspaper was given to Warren to indemnify him against the use of the firm name, Taylor & Warren. This mortgage was also renewed at short intervals. At the request of Taylor none of the mortgages were put on record until March, 1875. Each series of mortgages was renewed within every three months; and this, it was believed, would preserve the lien from the date of the several mortgages given in renewal, without expense and notoriety of registration. In other words, it was believed that mortgages on personalty might be recorded within three months after their execution, and this would operate constructive notice to creditors and purchasers from their date. Each of the loans was for the personal use of Mr. Taylor, and no part of the money was applied to the purposes of the partnership of Taylor & Warren. Neither Mrs. Benagh, nor Mr. Warren, knew of the mortgage to the other, or that the other loan had been negotiated. On the 23d of March, 1875, Mr. Taylor being short in the payment of interest, promised quarterly, to Mrs. Benagh, she consulted counsel, and on his advice had her mortgage recorded on that day. Warren's mortgage was recorded four days afterwards. The question presented is, which has the paramount claim on the mortgaged property? Warren has paid up the bill to Fitts & Co. out of his private funds, and he is the actor in this suit.

1. In settling partnership accounts, each partner is clothed with the right to insist that the partnership effects shall be first applied to the payment of the partnership debts; and this right will prevail over the claims of an alienee or creditor of the copartner. So clearly defined is this right—so necessary to persons engaging in joint adventures of this kind—that it has been long and firmly settled that each partner has a lien on the effects that they shall be applied primarily to the extinguishment of the partnership liabilities. This results, naturally and necessarily, from the nature of the enterprise and of the title by which the property is held. The title is in the company or association of individuals, and no one of the number has a separate ownership or right to any part or piece of the property or effects of the partnership. And the lien goes further than this. After the debts are all paid, each partner has a lien on the remaining partnership effects for any balance due him upon a proper accounting together. 1 Story's Eq. Ju. § 677; Moore v. Smith, 19 Ala. 774; Donelson's Adm'rs v. Posey, 13 Ala. 752; Cannon v. Copeland, 43 Ala. 201; McGown v. Sprague, 23 Ala. 524; Reynolds v. Mardis' Heirs, 17 Ala. 32; Reese v. Bradford, 13 Ala. 837; Lucas v. Atwood, 2 Stew

378; Emanuel v. Bird, 19 Ala. 596, 54 Am. Dec. 200; Bridge v. McCullough's Adm'rs, 27 Ala. 661; Waldron v. Simmons, 28 Ala. 629; Andrews v. Keith, 34 Ala. 722; Coster's Ex'rs v. Bank of Georgia, 24 Ala. 37; Parsons on Partnership, 265, 350, 351, 352, 168, 502; Fourth Nat. Bank v. Railroad Co., 11 Wall. (U. S.) 624, 20 L. Ed. 82; Rodriguez v. Hefferman, 5 Johns. Ch. (N. Y.) 417; Sitler v. Walker, Freem. Ch. 77.

2. The disputed question in this case is whether the claim of Warren is a partnership demand. There can be no question that it was a partnership debt, so long as it remained unpaid to Fitts & Co.; and they could have claimed and asserted all the rights against the partnership and its effects which the law accords to partnership creditors. The bill was executed in the firm name, with the knowledge and consent of both partners; and this bound the firm. Even if the firm name had been signed by one, without authority from the other, the bill was made to be used, and was used in borrowing money; and there is no evidence that Fitts & Co. knew the use to which the money was to be applied. We are not prepared to say that the debt would not have been a partnership liability, even if the bill had been executed as last supposed. Knapp v. McBride, 7 Ala. 19; Jemison v. Dearing's Ex'rs, 41 Ala. 283; Cullum v. Bloodgood, 15 Ala. 34; 2 Brick. Dig. 306, § 103; Sprague v. Zunts, 18 Ala. 382.

The relation between partners is one of generous confidence. In the absence of special agreements to the contrary, the law constitutes each the agent of the other, and the representative of the firm in the conduct of all the ordinary business of the partnership. The act of one is the act of all. If it be a mercantile partnership, a sale by one is a sale by all. And a payment to one member of the firm discharges the debt, although that member may misapply or squander the money. It is not unfrequently the case that one partner becomes more indebted to the firm than another. He may use more of the income and effects in his personal and private affairs, may overdraw his share, or may anticipate future receipts and emoluments, sometimes with and sometimes without his copartner's knowledge or permission. In either case, his share of the profits, or of the capital, if needed, will stand incumbered by a lien to make good such deficit to his copartner; and that lien will be paramount to the right of any alienee or creditor of his. "In general, when a sum of money is advanced to a partner, or a partner is permitted to take it as a loan, and there are no express terms agreed on, his profits are in the first place answerable; and, if they are insufficient, his share of the stock goes to discharge this balance; and, if that is insufficient, he becomes a personal debtor for the balance." Parsons on Partnership, 241. See, also, 3 Kent's Com. marg. p. 40 et seq.

If, instead of borrowing the firm's credit to raise money on, Mr. Taylor had used its money, or had hypothecated its bills receivable, and thus realized the sum of them on his private account—and this

either with or without Mr. Warren's consent—the rule above declared would have applied in all its force, and Mr. Warren would have held a lien. So, if there had been a partnership debt of Taylor & Warren, and Mr. Warren had paid it out of his private funds, this would have given him a claim and lien against Taylor's interest in either profits or capital of the partnership, paramount to the rights of creditors of or purchasers from Taylor. And such creditor or purchaser would have no right to complain; for he would realize, by the transaction, all that Taylor could claim. He would be entitled to no more. In other words, Mrs. Benagh, in this suit, can claim what Taylor could claim, if he were suing Warren; no more. She purchased no other right. See Donelson's Adm'rs v. Posey, and other authorities supra. She cannot complain of this; for, purchasing a partner's interest in partnership effects, it was her duty to inquire of the other partner how the account stood between them.

It will be seen that we have placed Warren's superior claim on the lien which the law gave him as a partner. Hence it was not necessary for him to take a mortgage, or, taking it, to have it recorded. When he incurred the liability for Taylor, by allowing him to pledge the credit of the firm, he had no knowledge or notice of Mrs. Benagh's claim. We need not and do not decide that his claim would prevail over Mrs. Benagh's, if, before the firm became bound to Fitts & Co., he had been notified of the conveyance to her.

We hold that, after taking a proper account between the partners, charging Taylor with the sum paid Fitts & Co. and interest as so much paid to and for him by Warren, the business manager, and charging to each partner all proper debits, and allowing to each all proper credits, if a balance be found due to Warren, he has a first lien on the partnership effects, income and capital, for its payment. This is his share in the partnership effects, and he is entitled to it, before Mrs. Benagh can take anything by her mortgage; any balance to be equally divided between Warren and Taylor, and the interest of the latter, as far as necessary, to be applied to the payment of Mrs. Benagh's mortgage and interest thereon from January 1, 1876. Should the balance, on taking the account, be found in favor of Taylor, and against Warren, then such balance to be a first lien in favor of, and applied, as far as necessary, to the payment of, Mrs. Benagh's mortgage debt, computed as above; any balance of partnership effects to be equally divided between the partners, and Taylor's share to go to Mrs. Benagh, so far as necessary to extinguish her mortgage claim. If anything be realized from the mortgaged property in Greene county, the product to be applied to the payment of Warren's claim, if necessary, after exhausting the partnership effects. Should any of the partnership property and effects be used in paying a balance found due to Warren, and should any portion of Mrs. Benagh's claim remain unpaid, and should there remain a surplus of proceeds of the Greene county mortgaged property, after paying Warren's claim, then, to the

extent that Taylor's interest mortgaged to Mrs. Benagh is applied to Warren's claim, she (Mrs. Benagh) is subrogated to the mortgage rights of Warren in the surplus of the proceeds of the Greene county mortgaged property.

The decree of the chancery court is reversed, and a decree is here rendered, in accordance with the principles declared above. Costs of appeal to be paid by the appellees.

CHAPTER VII.

REMEDIES OF PARTNERS INTER SE.

SECTION 1.—ACTIONS AT LAW.

SADLER v. NIXON.

(Court of King's Bench, 1834. 5 Barn. & Adol. 936.)

Assumpsit for money paid by the plaintiff to the defendant's use, etc. At the trial before Denman, C. J., at the London Sittings after last Michaelmas Term, the following appeared to be the facts of the case: The plaintiff, the defendant, and another person, being copartners in trade, employed a builder to repair a building which was their joint property and in which they carried on their trade. The builder brought an action against the three copartners for the repairs, and obtained judgment, but took the plaintiff only in execution, who, in order to regain his liberty, paid the whole debt. The present action was brought to recover one-third of the money so paid. It was contended that the plaintiff, one of the three joint contractors, having been compelled to pay money which his co-contractors were jointly liable to pay, was entitled to maintain this action. On the other hand, it was said that, the plaintiff and the defendants in the first action being not merely co-contractors, but copartners in trade, one of them could not maintain an action against the other to recover money paid on account of the firm, but that his remedy was by bill in equity; the reason why an action at law in such a case was not maintainable being that it would be useless for one partner to recover what, upon taking a general account among all the partners, he might be liable to refund, and this objection applying as well to a compulsory as to a voluntary payment. The Lord Chief Justice was of that opinion, and nonsuited the plaintiff, but reserved liberty to him to move to enter a verdict.

F. Pollock on a former day in this term moved accordingly. It may be conceded that, where one partner voluntarily makes a payment on account of the others, he cannot maintain an action at law against his copartners; but it is otherwise where the payment is by compulsion. The principle on which the plaintiff is entitled to recover is that he has been compelled to pay out of his own funds money which the defendant was jointly liable to pay.

Lord DENMAN, C. J., now delivered judgment, and said the court were of opinion that there was no ground for the distinction taken on the part of the plaintiff, and, therefore, there would be no rule.

Rule refused.

JACKSON v. STOPHERD.

(Court of Exchequer, 1834. 2 Cromp. & M. 361.)

Assumpsit for goods sold and delivered, with the money counts, and a count on an account stated. Plea, the general issue.

At the trial, before Bolland, B., at the last Assizes for the county of Lancaster, it appeared that, several years prior to December, 1831, the plaintiff and defendant became joint lessees of a coal mine, and had jointly carried on the working of the mine down to that period. At that time, the coal having been all gotten and the pit filled up, one Whitehead, at the request of the plaintiff and defendant, balanced the profit and loss of the concern, with the exception of some small coal on the coal-pit hill, and some debts due to the firm, and accounts to a small amount which were not then come in. The plaintiff said he would join in no more coal pits. The defendant said he would open another coal pit, whether the plaintiff joined in it or not. It was agreed that Whitehead should value the materials and utensils used for working the coal mine, and that they should take each an article successively, article by article, until the whole had been divided. Whitehead made an inventory and a valuation, and a few days afterwards he met them by appointment, in order to arrange about the division of the utensils valued, and told them that £171. 19s. 9d. was the amount of the valuation, and gave each a copy of the inventory and valuation. It was ultimately agreed that the defendant should take the whole of the utensils at the valuation, and the defendant afterwards took possession of the whole of the materials and utensils accordingly.

The valuation made by Whitehead was produced, but it was not stamped, and it was thereupon objected for the defendant that it was not admissible in evidence, and that parol evidence of the amount was also inadmissible. It was likewise objected that the action could not be maintained, inasmuch as there had been no final settlement of the partnership accounts, and no express promise to pay the moiety of the value of the materials. The learned Baron overruled the objections, but gave the defendant leave to move on both points. His Lordship told the jury that if they were of opinion that the partnership was dissolved, and that the footing on which the defendant took the utensils was that he was to pay for one-half of them, the plaintiff was entitled to their verdict. The jury found a verdict for the plaintiff for the sum of £85. 19s. 10d., being half the amount of the valuation.

F. Pollock, in Michaelmas Term last, obtained a rule to show cause

why the verdict should not be set aside, and a nonsuit entered, or a new trial granted.

Bayley, B. Upon the general rule of law there is no difficulty. One partner cannot maintain an action for a balance on the partnership account until the accounts have been settled and adjusted, and until it is ascertained what is the balance due from the partner against whom the claim is made. But there may be special bargains by which particular transactions are insulated and separated from the winding up of the concern, and are taken out of the general law of partnership. When we consider the circumstances of this case, the plaintiff's right of action may be put upon the footing of a separate transaction; and I collect that that was the footing upon which it was placed by my Brother Bolland.

The parties were about to divide the different articles, so as to put half in the one scale and half in the other; and if they had done that, and the plaintiff had afterwards sold his to the defendant, justice would have required that the plaintiff should pay the defendant for his moiety. But they might come to another agreement—that one partner should take the whole of the property, paying the value, distinct from the general account; and, upon the whole, I think that that was the transaction, and it is so found by the jury. Independently, therefore, of the general law of partnership, it seems to me that the nature of the bargain as to the division of the property raised an implied obligation on the defendant to pay in money before a final settlement of the accounts. The case of Fromont v. Coupland does not seem to me at variance in any respect with the other decisions, or with the view which I take of this case. A claim, by way of set-off, was there made, not on a bargain of an insulated nature, but on a balance of weekly accounts, and the court decided that it could not be maintained, as there had not been any final settlement. Here, unless there had been a consent and a purchase, the defendant would not have been entitled to use this property for his own separate purposes. It may be observed that the partnership there was continuing, and that the balance in favor of one partner at the end of one week might be against him at the end of the next, or at the conclusion of the partnership. As to the question of the stamp, it seems to me that St. 55 Geo. III, c. 184, sch. part 1, does not apply, as the valuation was for the information of the parties, and not binding upon them, although it was afterwards made the foundation of an agreement.

Vaughan, B. I am of the same opinion. I think this rule cannot be supported on either ground. It is, no doubt, a general rule that one partner cannot maintain an action on a partnership transaction so long as the partnership concerns remain unadjusted; but, if any subject be withdrawn, and made the foundation of a distinct settlement, it is then no objection that other accounts remain unadjusted. The question whether there was an agreement that the defendant was to

take the materials and utensils, and to pay the plaintiff one-half of the value of the whole, was left to the jury, and they found that it was so.

Rule discharged.[1]

BURLEY & HARRIS v. HARRIS.

(Superior Court of Judicature of New Hampshire, 1840. 8 N. H. 233, 29 Am. Dec. 650.)

This was assumpsit on an account annexed to the writ. The cause was tried on the general issue, and a brief statement was filed, alleging the causes of defense disclosed in this case. It was admitted that Harris, the defendant, was a partner in the firm of Burley & Harris, in whose name the suit was brought. The defendant had received goods belonging to the firm to the amount of $495.84, for which he was liable to account to the firm; but it was not admitted or proved that the defendant, on a full adjustment of the partnership affairs, would be found indebted to the firm. The parties offered in evidence the original articles of partnership betwixt them, and an assignment of the partnership demands to Burley, with an agreement that Burley was to account for these demands in payment of certain company debts, and in payment of Harris's portion of the partnership profits, if there should be any. The partnership business remains unsettled at this time. On the disclosure of these facts the court directed a nonsuit, subject to the opinion of the court; and it was agreed by the parties that, if this ruling of the court should not be sustained, the nonsuit was to be set aside, and judgment rendered for the plaintiffs for the amount of the account annexed.

UPHAM, J. The authorities are very clear that an individual cannot stand in the relation of plaintiff and defendant in the same suit. A judgment in such case would avail nothing, as the defendant would have the same right to discharge an execution founded on it as the plaintiff. The question has arisen in numerous instances where an individual has been a member of different firms, in which one firm held claims against the other and attempted to enforce them at law. Judge Story, in his treatise on Equity, says that no suit can be maintained at law in regard to any actions or debts between two firms, where individuals of the firms are partners in each. In such a case, all the partners must join and be joined; and no person can maintain a suit against himself, or against himself with others. The objection is a complete bar to the action. Nay, even after the death of the partner or partners belonging to both firms, no action upon any contract, or mutual dealing ex contractu, is maintainable by the survivors of one

[1] The concurring opinion of Gurney, B., is omitted.

firm against those of the other firm; for in a legal view there never was any subsisting contract between the firms, as a partner cannot contract with himself. 1 Story's Eq. 630; Bosanquet v. Wray, 6 Taunt. 597; Mainwaring v. Newman, 2 Bos. & P. 120; Jones et al. v. Yates et al., 9 Barn. & Cres. 532. In Eastman v. Wright, 6 Pick. (Mass.) 316, and May v. Parker, 12 Pick. (Mass.) 39, 22 Am. Dec. 393, are remarks of the court to the same effect. In the case of Holmes v. Higgins, 1 Barn. & Cres. 68, it appeared that a number of persons had associated themselves together and subscribed sums of money for the purpose of obtaining a bill in Parliament to make a railway. It was holden that they were partners, and that a subscriber who acted as a surveyor in their employ could not maintain an action against all or any of the subscribers. Chief Justice Abbot held that the subscribers were partners, and that it was perfectly clear that one partner could not maintain an action against his copartners for work and labor performed, or money expended, on account of the copartnership.

But in this case the partnership effects have been assigned to one of the firm, and it is contended that the assignment should be protected and the holder of the partnership property permitted to enforce all claims in the partnership name. This doctrine is correct. In many instances of dissolution of partnerships the remaining partner is, by agreement, exclusively authorized to arrange the joint affairs and to receive the partnership credits as the fund out of which to discharge the partnership debts. Where this is the case, and notice as well of the dissolution as of the private arrangement between the parties is given, a debtor to the firm cannot, by colluding with the outgoing partner, obtain from him a discharge of the debt. Gow on Part. 275; Henderson v. Wild, 2 Camp. 561; Skaife v. Jackson, 3 Barn. & Cres. 421; Scott v. Trents, 1 Wash. (Va.) 77; Mountstephen v. Brooks, 1 Chit. 390; Arton et al. v. Booth, 4 Moore, 192. The claims of the firm against all persons, other than the partners, may well be enforced under such an arrangement. But until a final adjustment is made of the balance due on all partnership accounts, or at least until some balance is struck, and a specific sum is found due to some one partner, no suit can be enforced by one member of a firm against another. Gow on Part. 88; Walker v. Long, 2 Browne (Pa.) 125; Ozeas v. Johnson, 4 Dall. (Pa.) 434, 1 L. Ed. 897; Murray v. Bogert et al., 14 Johns. (N. Y.) 318, 7 Am. Dec. 466; Beach v. Hotchkiss, 2 Conn. 425; Bond v. Hays, 12 Mass. 34; Wilby v. Phinney, 15 Mass. 116; Fanning v. Chadwick, 3 Pick. (Mass.) 420, 15 Am. Dec. 233; Brinley v. Kupfer, 6 Pick. (Mass.) 179; Foster v. Alanson, 2 D. & E. 479.

No settlement of the partnership claims has been made in this case. The assignment to Burley is in fact a mere power of attorney, authorizing him to collect the partnership demands and apply them in payment of the partnership debts, while he was to hold the balance to be adjusted by the partners. The partner who took upon himself

the business of collection covenanted to account for all the property received, to pay the debts, and to pay the defendant his share of the profits upon a final settlement, if the firm should be found to have realized any profits for division. The partnership business as betwixt the partners was left entirely unsettled, and in case of any difficulty in the settlement betwixt them their claims were to be submitted to the arbitration of individuals designated in the articles of dissolution. There is no pretense, then, for maintaining this suit, on the ground of any adjusted balance made betwixt the parties. It is a mere naked suit brought by a firm against a partner for an indebtedness to the firm. The suit is, therefore, felo de se. The parties on either side upon the record are the same. Should any difficulties arise in the final settlement of the concerns of these partners, there is a plain remedy in equity, where the objections which occur here would not exist. Suit dismissed, without costs.

LEDFORD v. EMERSON.

(Supreme Court of North Carolina, 1905. 140 N. C. 288, 52 S. E. 641, 4 L. R. A. [N. S.] 130.)

The principal action was instituted in July, 1903, to recover plaintiff's share arising from a sale of certain options on land situated in north Georgia, same having been procured by plaintiff in the years 1900, 1901, etc., and sold by defendant in April, 1903, at a price of $10,000. The allegation and testimony of plaintiff tended to show that plaintiff procured a large number of options on land in north Georgia, and took same in the name of defendant, under an agreement that defendant was to advance the incidental expenses, sell said options, and divide the profits equally with the plaintiff; that defendant, having sold said options at the price of $10,000, fraudulently concealed the facts from plaintiff and paid plaintiff $250 which plaintiff took under false and fraudulent assurances as to the disposition of the options, giving defendant his receipt in full, and defendant had failed to make any other or further payments to plaintiff by reason of said deal, etc. As ancillary to the principal action, an order of arrest was issued in the cause on affidavits duly made on February 15, 1904, and defendant was arrested thereunder and held to bail. There was a motion to discharge the order of arrest, heard before Judge Neal, as stated. Motion allowed, and plaintiff excepted and appealed.

HOKE, J. The judge below on the hearing found the facts containtained in the plaintiff's affidavits to be true, and held, as a matter of law, that on these facts there was no right shown to arrest defendant. His honor thereupon discharged the order of arrest and entered judgment exonerating the bail from any and all liability by reason of his suretyship. This, as we understand, was on the idea that the

facts disclosed a case of partnership, and in such case there was no legal right in one partner to cause the arrest of another. It is a well-recognized principle that, during the continuance of a partnership, one partner cannot sue another on any special transaction which may be made an item of charge or discharge in a general partnership account. This has sometimes been put on the ground that such a suit would necessitate that the party complained of should be both plaintiff and defendant. But I apprehend a reason of more moment is that as to such a transaction, till a full accounting is had, it cannot be ascertained or declared what portion of such claims belong to the one or the other; and so it is true that one partner, during the continuance of the partnership, cannot ordinarily bring trover or trespass against the other by reason of acts concerning partnership property, unless the same be destroyed or removed entirely beyond the reach or control of the complaining party, for one has no more right to deal with the property than the other. Where, however, the partnership has terminated, and, all the debts having been paid and the partnership affairs otherwise adjusted, nothing remains to be done but to pay over an amount due from one to the other, to be ascertained by a reckoning as to one special item, or even several items, the matter presenting no complication of any kind, as in Clarke v. Mills, 36 Kan. 393, 13 Pac. 569; or where the partnership was for a single venture or special purpose, which has been closed, and nothing remains but to pay over the claimant's share of the proceeds, as in Jacques v. Hulit, 16 N. J. Law, 38—in either case an action would lie in favor of one against the other. George on Partnership, 304; Bates on Partnership, 865, 866; Clarke v. Mills, and Jacques v. Hulit, supra; Musier v. Trumpbour, 5 Wend. (N. Y.) 274; Moran v. Le Blanc, 6 La. Ann. 113; Wheeler v. Arnold, 30 Mich. 304. In Clarke's Case, supra, Holt, P. J., for the court, said: "There were no debts to be paid, no money to be collected, no property to be disposed of, and under the facts of the case it was purely a pecuniary demand, involving no complications that could not properly be determined in a justice's court. In Wheeler v. Arnold, supra, it is held: "The remedy at law for contribution between two partners after dissolution is admissible, and, when there have been no such dealings with assets and no such private relations with the firm as to make a settlement difficult, there would be no occasion, under our statutes making discovery obtainable at law by an examination of parties as witnesses, for an accounting in equity." In Jacques v. Hulit, supra, it is held: "A mutual covenant to divide the proceeds of a certain crop, if it be a partnership, is so only for a special purpose and terminates as soon as the crop is sold; and an action lies by one of the parties against the other for any balance due thereon to the plaintiff from the defendant, without resorting to the action of account render."

This being the correct doctrine, and an action at law maintainable, the facts bring the claim within the provisions of our statutes on arrest

and bail, no reason occurs to us why the plaintiff should be deprived of this ancillary remedy. * * *

There was error in allowing the defendant's motion, and the order to that effect will be set aside.

CLARKE v. MILLS.

(Supreme Court of Kansas, 1887. 36 Kan. 393, 13 Pac. 569.)

HOLT, C. The defendant in error, plaintiff below, brought his action against plaintiff in error, defendant below, before a justice of the peace. He alleged in his bill of particulars that the plaintiff and defendant were joint makers of a note for $500, and that he had paid the same in full, with interest, and prayed for contribution. The defendant made application for and obtained a continuance in the justice's court, but neither filed any pleadings, nor appeared at the trial therein. Judgment was rendered for plaintiff, and defendant appealed to the district court. In the district court defendant set forth that plaintiff and defendant were partners, and that the note sued on was given for money that was used in the partnership affairs; that, as such partners, they had never had a final settlement, and there had never been an accounting between them; that plaintiff kept the accounts of the firm, and had neglected and refused to account with him; and also that upon a proper and final adjustment the defendant did not owe plaintiff. * * *

Another alleged error is that the specific findings of fact did not authorize the judgment rendered. The court found there had been no settlement or accounting between the partners; also there were no claims against, and no credits in favor of, the firm; and that all partnership property had been disposed of. The controversy was between only two parties, and concerning a limited number of transactions. The question to be decided was simply whether Mills had put into the partnership business more money than Clarke. There was no receiver to be appointed, no claims to be collected, no actions to be brought against debtors of the firm, no debts to be paid, no property to be disposed of, no relief was sought, except an ordinary money judgment. The findings of fact were sufficient to authorize such a judgment in favor of Mills. The plaintiff in error cites a large number of cases to support his theory that no judgment could be rendered in favor of one partner against another, based upon partnership dealings, where there had been no accounting between them. The authorities cited fully sustain his theory that an accounting must be first had between partners before an action for the recovery of money only can be maintained. Lawrence v. Clark, 9 Dana (Ky.) 257, 35 Am. Dec. 133; Course v. Prince, 1 Mill, Const. 416; Graham v. Holt, 25 N. C. 300, 40 Am. Dec. 408; Harris v. Harris, 39 N. H. 45; Smith v. Smith, 33 Mo.

557; Tolford v. Tolford, 44 Wis. 517; Ivy v. Walker, 58 Miss. 253; Crossley v. Taylor, 83 Ind. 337; Bowzer v. Stoughton, 119 Ill. 47, 9 N. E. 208. The practice in actions between partners for the settlement of their partnership matters has not been uniform in the different states. In fact the conflict of authorities appears to be irreconcilable. The courts in Massachusetts early laid down the rule that, in case of copartners, neither a settlement of the accounts, nor an express promise to pay, need be proved, where the suit is assumpsit for the balance, and they have adhered strictly to that practice. Williams v. Henshaw, 11 Pick. (Mass.) 79, 22 Am. Dec. 366; Brigham v. Eveleth, 9 Mass. 538; Bond v. Hays, 12 Mass. 34; Wheeler v. Wheeler, 111 Mass. 247; Wright v. Cumpsty, 41 Pa. 102. This court in Pettingill v. Jones, 28 Kan. 751, cited with approval Wheeler v. Arnold, 30 Mich. 304. We now believe the rule there laid down is reasonable and applicable to the facts in this case, and is in consonance with the liberal provisions of our Code. In that case the court said: "There was no occasion for an accounting in equity, unless there had been such dealing with assets, as well as such private relations with the firm as to make a settlement otherwise difficult; and, there being only two partners concerned (and discovery being now obtainable as well at law as in equity), there would seem to be no very good reason why the remedy at law would not be entirely adequate."

It is recommended that the judgment of the court below be affirmed.

BURNS v. NOTTINGHAM.

(Supreme Court of Illinois, 1871. 60 Ill. 531.)

WALKER, J. This was an action of assumpsit, brought by defendant in error, in the Kankakee circuit court, against plaintiff in error. A trial was had by the court and a jury, resulting in a verdict and judgment of $1,000 against plaintiff in error, to reverse which the record is brought to this court on error.

It appears that the parties to this suit were, for a time, partners as sutlers for the army, and afterwards took one Robinson into the firm. This action was brought to recover a balance claimed to be due from plaintiff in error on a settlement of the affairs of the firm; but it is urged by plaintiff in error that the evidence fails to show a final settlement, the ascertainment of the balance due, and a promise to pay the same. It is the settled law of this court that one partner cannot bring an action in assumpsit against his late partner, unless upon a dissolution of the copartnership the partners account together, and a balance is stated in favor of one, and the other agrees to make payment of such sum. The balance so found must be a final settlement of all the partnership accounts, but balances only struck preparatory to a final account are not sufficient to form the subject-matter of an action at

law. Until this is done, the remedy is in equity. Davenport v. Gear, 2 Scam. 495; Frink v. Ryan, 3 Scam. 322; Chadsey v. Harrison, 11 Ill. 151; Ridgway v. Grant, 17 Ill. 117. And, as a general rule, such a settlement must be accompanied by a promise to pay by the partner thus found indebted, to confer jurisdiction on a court of law.

The question is, then, presented whether, in this case, it appears that there was such a settlement and promise. A written statement signed by the parties was produced and read in evidence, which states that it is a settlement between the parties to this suit, but is not signed by Robinson, the other partner. It states that it shows the profits of the concern. It fails to state in whose hands the funds were, and there is no presumption that one partner has them, rather than another, as each has an equal right to retain them until there is a final settlement.

This instrument does not fix any amount that each partner is entitled to receive out of these profits; nor does it appear whether the partners had each received his share of the capital stock put into the partnership, or what amount, if anything, may have been drawn out by the several partners. Although called a settlement, it is indefinite and wholly unsatisfactory as to the rights and liabilities of the several partners. Again, Robinson was not a party to this statement, and, if he were, it fails to appear what portion of these profits belong to him. This written statement is wholly insufficient to fix a liability for any sum on plaintiff in error. * * *

In considering all the evidence, we fail to find that there was a final settlement, a balance struck, and a promise to pay the balance. It is not shown by the written instrument, nor is any amount fixed upon by defendant in error, which was admitted by plaintiff in error as being due him; and plaintiff in error denies that he agreed to any definite amount. This, then, falls far short of the evidence of such a settlement of the partnership affairs, and the striking of a balance, as authorizes a recovery in an action of assumpsit for money had and received. On the state of facts disclosed by this record, the only remedy is in a court of equity.

The court below erred in overruling the motion for a new trial, and the judgment of the court below is reversed, and the cause remanded.

Judgment reversed.[1]

[1] "It is contended by counsel for appellee that one partner cannot sue another at law for an unsettled account, and that chancery has exclusive jurisdiction of unsettled matter between partners. Upon this point there is no controversy. But it is also claimed by appellant that the principle is fully and clearly settled that one partner can maintain an action at law against his copartner upon an amount found to be due him upon settlement and account stated. We think the current of authorities show this to be the proper and settled rule. While in some courts it has been held that upon a settlement of partnership accounts an express promise to pay is essential to support an action, yet in most of the states it has been held that, where there has been a settlement and balance ascertained, the law itself will imply a promise to pay. Collyer on Partnership, §§ 278, 279, 280, and note; Story, Eq. Jur. § 644, and note." Per Baldwin, J., in Wycoff v. Purnell, 10 Iowa, 332 (1860).

OWEN v. MERONEY.

(Supreme Court of North Carolina, 1904. 136 N. C. 475, 48 S. E. 821, 103 Am. St. Rep. 952.)

This was a civil action commenced by plaintiff against defendant to recover damages for defendant's failure to carry out and comply with his part of a contract as a condition precedent to the formation of a partnership. The complaint alleges that in the year 1900 plaintiff was engaged in running and operating a mill in Davidson county and defendant owned a mill site in Rowan county, known as the "St. John Mill Property," and defendant, realizing that plaintiff was an expert millman, went to him and made him a proposition that if he would dispose of his mill property in Davidson county, and go in with him and operate a mill in Rowan county, he (defendant), as a condition precedent, and an inducement for him to become his partner, would put in a dam and wire ferry across the river, repair the road leading to the mill, and furnish all the necessary money, except $1,500, to equip said mill with up to date machinery, and run it to its capacity, and buy and carry a complete stock of flour, meal, grain, etc. But that, after defendant had gotten all of plaintiff's money, he refused to comply with or carry out his part of said agreement; that, after defendant had failed and refused to comply with his part of said agreement, the milling business they had anticipated doing and operating became a failure, and plaintiff's $1,500 he invested therein became a loss, whereas, if defendant had complied with his part of said agreement as a condition precedent to the formation of the partnership, said milling business would have been a success, and plaintiff would not have been damaged. Plaintiff appealed from the judgment rendered.

Clark, C. J. The record states that: "The defendant moves to dismiss the action because he says that this is an action at law by one partner against his copartner, as appears upon the face of the pleadings. The court being of opinion that the action cannot be maintained in this form, dismissed the action." The plaintiff appealed. It has been more than a generation since we abolished by constitutional provision (article 4, § 1) "the distinctions between actions at law and suits in equity, and the forms of all such actions and suits," and it is a recurrence to a procedure familiar only to the lawyers of a former generation to hold that an action "cannot be maintained in this form." There are but two grounds not known to dismiss at this stage; i. e., either that the court has no jurisdiction, or that the complaint does not state a cause of action. We give the defendant the benefit of translating the ground of his motion into the latter objection, which is one "of substance, and not of form," that an action cannot be maintained by one partner against another for a partial accounting, but he must either sue for a complete settlement and winding up of the partnership matters, or to recover a balance struck and agreed upon between

them. Thus understood, this is a correct statement of the general rule (2 Lawson, Rights & Remedies, § 681, cited by defendant); but it has no application to this case, which comes within the exceptions stated in that section. This is not an action for a partial adjustment and statement of partnership dealings, but it is an action to recover damages because the defendant refused and failed to comply with his preliminary agreement and the terms upon which the partnership was to be formed; and, if said partnership was formed, then for damages because the defendant failed to do and perform what he agreed to do before it was formed. An action "may be maintained by one partner against another partner in the same firm upon the expressed promise made before the commencement of the partnership in respect to advances to be made to constitute the capital of the company for the purpose of carrying on the partnership." Currier v. Webster, 45 N. H. 226; Hill v. Palmer, 56 Wis. 123, 14 N. W. 20, 43 Am. Rep. 703; Smith v. Kemp, 92 Mich. 357, 52 N. W. 639; Bull v. Coe, 77 Cal. 54, 18 Pac. 808, 11 Am. St. Rep. 235; Ellison v. Chapman, 7 Blackf. (Ind.) 224; George on Partnership, pp. 320, 321. "A suit by a partner against his copartner upon a claim not founded on the plaintiff's interest in the partnership assets, but arising from a direct violation of the articles of agreement of copartnership, need not be delayed for the taking of an account of the partnership." George, Partnership, p. 322, and numerous cases cited in note 68. The general rule that one partner cannot sue another except to wind up the business or to recover a balance due by the settlement, with some of the exceptions to that rule, is stated in Newby v. Harrell, 99 N. C. 149, 5 S. E. 284, 6 Am. St. Rep. 503.

This case presents another exception. A cause of action for the recovery of damages is stated in the complaint. * * * The judgment dismissing the action is reversed.

COOK v. CANNY.

(Supreme Court of Michigan, 1893. 96 Mich. 398, 55 N. W. 987.)

Action by George W. Cook against Charles C. Canny for breach of contract. On September 5, 1888, complainant filed an application for letters patent of the United States for improvements in underground conduits for electrical conductors. October 12, 1888, plaintiff and defendant entered into written articles of agreement for a partnership, by which the plaintiff agreed to assign to defendant an undivided one-third interest in the invention and the patent which might be obtained therefor in consideration of $1,000, which the defendant agreed to pay as follows: $300 in cash as soon as notice was received of the allowance of the patent; a monthly payment of $30 per month for eight months from the date of allowance, and $460 on the 1st day

of September, 1889, if said conduit should be a practical success, and should perform the duties specified and required for such work. The agreement further provided for carrying on the business after the allowance of the letters patent, and defined the duties of each partner. These provisions are not necessary to a determination of the case. The letters were issued, and the assignment duly made to the defendant. Plaintiff admitted payments of $303.75. The defendant claimed to have paid $464. Plaintiff gave evidence tending to show that the conduit was a practical success. Defendant gave evidence tending to show the contrary, and that the contract was abandoned by mutual consent. The court instructed the jury that, if the conduit was not a practical success, or if the contract was abandoned by mutual consent, the plaintiff could not recover. At the request of the defendant the following special question was presented to the jury, viz.: Do you find that the conduit was a practical success? which question the jury answered in the affirmative. Verdict and judgment for the plaintiff for $840.95. Defendant brings error.

GRANT, J. It is first insisted by defendant that a suit at law cannot be maintained on account of the partnership relations. The sum sued for does not grow out of their partnership transactions subsequent to the formation of the partnership. It is an independent consideration, which defendant agreed to pay the plaintiff for an interest in the letters patent which were to form the basis of their subsequent partnership relations and dealings. The sum which the defendant agreed to pay was to launch the enterprise in its very inception. This case, therefore, forms one of the exceptions to the rule that one partner cannot maintain an action at law against his copartner for work done or money expended in the partnership. An agreement to pay money or to furnish stock for the purpose of launching the partnership is an individual engagement of each partner to the other, and the defaulting partner may be sued in an action at law upon his agreement. It is entirely separate and distinct from the partnership accounts, and this forms the true test in determining whether an action at law will lie by one partner against his copartner. 1 Story, Eq. Jur. § 665; Brown v. Tapscott, 6 Mees. & W. 119; Van Ness v. Forrest, 8 Cranch (U. S.) 30, 3 L. Ed. 478; Currier v. Rowe, 46 N. H. 72; Neil v. Greenleaf, 26 Ohio St. 570; Howard v. France, 43 N. Y. 593; Crater v. Bininger, 45 N. Y. 545; Lindley, Partn. 1024. * * *

Judgment affirmed.

CROCKETT v. BURLESON.

(Supreme Court of Appeals of West Virginia, 1906. 60 W. Va. 252, 54 S. E. 341, 6 L. R. A. (N. S.) 263.)

Cox, J. W. S. Crockett complains of a judgment of the circuit court of Mercer county, dismissing an action at law originally instituted by him against T. H. Burleson before a justice, and tried in said circuit court upon appeal. The plaintiff, Crockett, claims that he and the defendant, Burleson, were partners in the livery business in the city of Bluefield; that the defendant was the active member of the firm, and conducted its business and kept its books; that on the 16th day of January, 1904, a contract was entered into between them finally settling and dissolving the partnership, whereby the plaintiff took over for value as his individual property certain items of charge against others as debts owing to the firm; that previous to the making of the contract the books were turned over to plaintiff; that he made therefrom a list of said charges apparently owing to the firm; that the list was then turned over to defendant for correction; that after he corrected the list he returned it to plaintiff, and represented to him that it was correct; that plaintiff believed such representations and was induced by them to enter into the contract; that but for such representations he would not have entered into the contract; that it afterwards turned out that some of the charges contained in said list were false charges, and that others had been collected by the defendant at the time such representations were made; and that, after discovering the fraud and without rescinding the contract, the plaintiff instituted this action, claiming $295.95 as damages for the deceit. Plaintiff claims other matters not necessary to be mentioned here. Upon the trial in the circuit court the plaintiff offered evidence tending to prove the essential elements of his claim above stated; but upon objection and motion the court excluded the plaintiff's evidence, directed a verdict for defendant, and entered the judgment of dismissal.

The single question presented here is, Can this action at law for the alleged deceit be maintained by the plaintiff against the defendant, his former partner? * * *

It is contended that this action for alleged deceit is not cognizable at law, because the partnership relation existed between plaintiff and defendant when the alleged deceit was practiced, and because the alleged deceit related to the state of the indebtedness owing to the firm, and because this action necessarily involves a reopening and resettlement of the partnership accounts and business. A partnership is founded in contract. The contract, from its very nature, creates a relation of mutual trust and confidence. Parsons on Part. (4th Ed., 1893) § 191, says: "Whenever there has been any breach of an express stipulation between persons who are partners, an action for

damages will be sustained, unless the breach, or the stipulation itself, or both, are such that they involve the whole partnership business and accounts, and the damages can be determined only by first settling those accounts." See, also, Barton's Law Prac. § 69; Story on Part. § 218. In Freeman's note to the case of Course v. Prince, 12 Am. Dec. 650, it is said: "If the demand, even though it relates in some measure to partnership matters, is yet so specific and distinct that the right to recover cannot in any event be affected by the state of the partnership accounts, it is suable at law. Thus an action of damages will lie when it does not involve any inquiry into the affairs of the firm. Wills v. Simmonds, 8 Hun (N. Y.) 189. So an action lies for an agreed price of certain partnership stock. Edens v. Williams, 36 Ill. 252. So upon an express promise to furnish a given amount of capital or to pay for particular articles. Collamer v. Foster, 26 Vt. 757. And on an express promise to pay half of a specific sum required for a certain joint advénture. Morgan v. Nunes, 54 Miss. 308. So on a promissory note executed by one or more of the partners to a copartner (Bonnaffe v. Fenner, 6 Smedes & M. [Miss.] 212, 45 Am. Dec. 278; Wright v. Jacobs, 61 Mo. 19), although the note is given in payment for partnership stock (Scott v. Campbell, 30 Ala. 729), or is given for the use of the firm (Anderson v. Robertson, 32 Miss. 241), and one item may be separated from the rest of the partnership transactions and adjusted independently so as to support an action. Byrd v. Fox, 8 Mo. 574; Gibson v. Moore, 6 N. H. 547; Holyoke v. Mayo, 50 Me. 385; Neil v. Greenleaf, 26 Ohio St. 567. So an action will lie on a note given on a partnership settlement. Sturges v. Swift, 32 Miss. 239." In the case of Newman v. Ruby, 54 W. Va. 381, 46 S. E. 172, an action at law was allowed by one partner against another for money advanced by the former in payment of the share of the latter to the capital of the firm. Judge Poffenbarger, delivering the opinion, quotes approvingly from Dr. Minor (3 Inst. 700) in part as follows: "But, where no such adjustment of the partnership is requisite to reach the merits of the case, a partner may as readily sue a copartner, in a court of law, as a stranger."

Thus we see that one partner is not always precluded from an action at law against another partner upon contract, but that under certain circumstances such an action at law may be maintained when it does not involve an adjustment or settlement of the partnership business or accounts, or where the subject-matter has been so separated from the partnership business as not to be a part of it. It will be observed that the authorities last cited relate to actions ex contractu between partners. In the case at bar the partnership has been finally settled and dissolved. The partnership relation no longer exists. The wrong complained of does not involve in this action the reopening or readjustment of the partnership business or accounts. The contract of settlement and dissolution stands without rescission. The ground of action is in no way connected with the state of the partnership ac-

counts or business, except that the deceit is alleged to have been practiced in relation to the state of the indebtedness owing to the firm before the dissolution. In this action at law the alleged deceit is not, and cannot be made, the ground for setting aside the contract of settlement or for reopening the accounts. Plaintiff has elected to sue at law for the alleged deceit. This he may do. 8 Am. & Eng. Pl. & Pr. 887; Webb's Pollock on Torts, 348; 2 Kent, Comm. 490, note; Schuchardt v. Allens, supra; Eaves v. Henderson, 17 Wend. (N. Y.) 191. "If a vendor, by fraud practiced on a vendee, has sold what he at the same time warranted, a case of simultaneous contract and tort, the vendee may have his remedy either upon the practiced deceit or upon the warranty, as he chooses." Bishop on Noncontract Law, § 77. The gravamen of the action in this case is the alleged tort—the alleged personal wrong done to one partner by another, as to which there can be no partnership relation. The late partnership is in no way concerned. It cannot be conceived that there is anything in the former partnership relation which prevents the maintenance of this action, brought for damages for the alleged deceit. The case of Farnsworth v. Whitney, 74 Me. 370, illustrates the principle involved. A sufficient statement of the case appears from the syllabus, which is as follows: "Where two members of which a firm is composed settle their partnership affairs and dissolve, and one of them takes the assignment of the other's interest in the partnership property, paying therefor a sum agreed upon by them, and assumes the payment of the partnership debts, the effect of the arrangement is to extinguish the assignor's indebtedness to the firm and interest in it. If one of the parties is defrauded in the settlement, he may rescind the settlement, or bring an action on the case for the deceit, but he cannot adhere to the settlement and resort to an action of assumpsit to recover any sum which the settlement purported to adjust." In the case of McAuley v. Cooley, 45 Neb. 582, 63 N. W. 871, it was held: "Where a partnership business has been fully settled upon an agreed basis furnished by the books kept by one partner, and all of its assets by agreement have been turned over to the other partner, and afterwards it transpires that, by reason of the failure of the partner who kept the aforesaid books to enter therein items showing his own receipt of money of the firm, his partner has suffered damage to the extent of such items, an action at law may be maintained for such damage against the partner who caused such injury, and against such sureties as have agreed to be responsible for damages of the character described."

It follows from what we have said that the action of the lower court in excluding the plaintiff's evidence, directing a verdict for defendant and dismissing this action, was erroneous. * * * For the reasons stated, the judgment complained of is reversed, the verdict of the jury set aside, a new trial awarded, and the case remanded for further proceedings according to law.

CARPENTER v. GREENOP et al.

(Supreme Court of Michigan, 1889. 74 Mich. 664, 42 N. W. 276, 4 L. R. A. 241, 16 Am. St. Rep. 662.)

CAMPBELL, J. Plaintiff purchased in good faith, but after maturity, a note of John Greenop & Co., payable to the order of Robert A. Lavery, and indorsed by Lavery. Lavery was a member of the firm of John Greenop & Co., and made the note, with Greenop's consent, for money lent by Lavery to the firm. The note was dated January 21, 1883, payable in six months. It was transferred to plaintiff in 1884 while the firm was still in business, and about a year before it ceased doing business. There was no evidence of the state of accounts, or that Lavery was in any way a debtor to the firm when the transfer was made, or that there were any equities existing against him which did not exist when the note was made. The court below held that plaintiff could not recover. The reason assigned was that the note could not be transferred after maturity, so as to enable the indorsee to sue upon it, if suit could not have been brought by the assignor, and that Lavery could have brought no suit on it. The decision also seems to have been based partially on the idea that a partner can have no dealings with his firm which are not subject to the final accounting, and that the equities of such an accounting attach to such claims as he may hold against the firm. I do not think this doctrine is tenable. * * *

While there is a difficulty in a suit at law in the name of a party against himself, yet, if this is the only difficulty, it goes only to the form of the remedy, and not to its existence. There never was any legal or equitable reason why a partner should not have specific dealings with his firm as well as any other person; and unless those dealings, from their nature, are intended to go into the general accounting, and wait for their adjustment till dissolution, they give a right to have a remedy according to their exigency, and can be dealt with like any other claims. The only reason why they must, under the old practice, be prosecuted at equity instead of at law, arose from the necessity at law of having plaintiffs capable of suing the defendants. In such a case the failure of a remedy at law justified a resort to equity. But equity could grant relief in such cases, and under our present rules there can be no difficulty at law. Where partners have seen fit to deal with each other without reference to the final accounting, the transaction is not subject to the necessity or delay of such an accounting.

This note was by its terms negotiable. It is elementary doctrine that negotiability does not cease when paper matures. It is only subject to such equities as exist against the paper at the date when it is negotiated. And the equities which affect the indorsee are only such

as attach directly to the note itself, and do not include collateral matters. This is very old doctrine, and is laid down without qualification.
* * *

It was not shown, and cannot be claimed on this record, that there was any unfairness or want of consideration, or payment, or any other matter bearing on the note in this case, when it was transferred, and in such case can make no difference when it was transferred. It continued to be a valid note, and capable of transfer by indorsement. That a partner himself may have a remedy of some kind, where the transaction is such as to be separated from the general partnership accounting, does not seem to be questioned. Mr. Collyer refers to several illustrations, in book 2, c. 3 (2d Ed.) Partn. Judge Story, in his work on Partnership, § 222 et seq., indicates very clearly the right of a partner to relief in the case of contracts as a creditor or otherwise with his firm; and the fact which is referred to in all the books, that an accounting can only be had at the close of the business, indicates as clearly as anything can that either a partner can make no separate contract with his firm at all, or else there must be some means of enforcing it. A contract which cannot be enforced is nugatory. Partnerships are often made for long terms of years. Members become managers on salaries which are payable at regular intervals, and they frequently furnish articles for which they are entitled to pay. No one doubts their rights to pay themselves out of moneys in their charge; but all do not have this opportunity, and to hold that a person must, if his copartners will not advance him what is due, wait the whole term of business for payment, is not reasonable or maintainable. A very thorough discussion of the various questions is found in the early case of Smith v. Lusher, 5 Cow. (N. Y.) 688, where the judges of the Supreme Court, and the chancellor and other members of the court for the correction of errors, dealt with the subject in a very exhaustive way, with entire unanimity. The cases of Nevins v. Townsend, 6 Conn. 5, and Gray v. Bank, 3 Mass. 364, 3 Am. Dec. 156, are also somewhat pertinent. I have found no authority which sanctions the doctrine that plaintiff was precluded by the fact that the note was past due from taking the title by indorsement, and none that allows a note to be affected by collateral equities. When this note was indorsed there could be no accounting, because the firm continued its ordinary business. The debt was for a loan, and not for investments in the capital. It was distinct from the mutual relations among the partners, and stood as a separate contract. I think there was nothing to bar recovery, and that the judgment to the contrary should be reversed.[1]

[1] The dissenting opinion of Sherwood, C. J., is omitted.

CROSBY v. TIMOLAT et al.

(Supreme Court of Minnesota, 1892. 50 Minn. 171, 52 N. W. 526.)

Action by George H. Crosby, as receiver of the partnership property of Miller & Timolat, against Harry W. Timolat and George W. Stevens, to recover for services rendered by Miller. From an order overruling defendant Stevens' demurrer to the complaint he appeals.

DICKINSON, J. This is an appeal by the defendant Stevens alone from an order overruling his demurrer to the complaint. It appears that Miller and Timolat were engaged as copartners in the business of buying and selling real estate. At the same time Stevens and the same Timolat were copartners in the enterprise of buying, holding, and selling certain specified tracts of land. That Miller and Timolat, as such copartners, and at the request of the defendants, Stevens and Timolat, as copartners, performed services in selling the land which was the subject of the partnership enterprise of the latter. After that, in an action prosecuted by Miller against Timolat, this plaintiff was appointed receiver of the partnership property of the firm of Miller & Timolat, with power to sue for and collect all debts due to that partnership. He prosecutes this action to recover the value of such services rendered for the defendants. The appellant relies upon the technical rules of the common law. It is true that an action at law for such a cause as that stated in the complaint could not have been maintained by a partnership against another partnership having a common member with the former firm. It was not permitted that one of the parties should thus appear both as a plaintiff and defendant, in effect prosecuting an action against himself, in which, if a recovery were to be allowed, it would be in his favor, and at the same time against himself. Nor, at law, would the contract or agreement between the two firms having a common member be recognized as creating a legal obligation or cause of action. The transaction would be treated as an attempt by a party to enter into a contract with himself. Bosanquet v. Wray, 6 Taunt. 597; De Tastet v. Shaw, 1 Barn. & Ald. 664, 669; Leake, Cont. 439, 440; McFadden v. Hunt, 5 Watts & S. (Pa.) 468; Price v. Spencer, 7 Phila. (Pa.) 179. The remedial system of the common law was too inflexible and restricted to enable it to adjust the complex rights and obligations of the parties under such circumstances. But in equity the agreements of the members of firms so related to each other were treated as obligatory, and the fact that one of the parties to the joint contract stood in the position of both an obligor and obligee did not stand in the way of affording such relief or remedy as might be found to be appropriate and necessary to the ends of justice. 1 Story, Eq. Jur. §§ 679, 680; Haven v. Wakefield, 39 Ill. 509; Chapman v. Evans, 44 Miss. 113; Calvit's Ex'rs v. Markham, 3 How. (Miss.) 343; Hayes v. Bement, 3 Sandf. (N. Y.) 394. With the statement of these propositions the

objections to the sufficiency of the complaint upon the grounds stated in the demurrer are overcome. There is a cause of action stated of an equitable nature, if not legal—and if it is either the demurrer cannot be sustained—and the plaintiff has legal capacity to sue. The very objections which the appellant urges to the sufficiency of the complaint as setting forth a legal cause of action go to show that relief should be afforded in equity at least. If the fact that Timolat is one of the obligors in the contract as well as an obligee renders necessary any apportionment of the amount to be recovered, or any equitable adjustment of the rights of the parties, the court is competent to do what is necessary. At present the question is not how the matter is to be adjusted, or what recovery shall be allowed, but only as to whether the action can be maintained at all. As bearing upon this question may be cited, in addition to the authorities above referred to Cole v. Reynolds, 18 N .Y. 74; Schnair v. Schmidt, 59 Hun, 625, 13 N. Y. Supp. 725; Lathrop v. Knapp, 37 Wis. 307; In re Buckhause (Ex parte Flynn) 2 Lowell (U. S.) 331, Fed. Cas. No. 2,086. It is unnecessary to consider whether this plaintiff, as the receiver of the creditor partnership, could maintain a merely legal action against the members of the other firm. Order affirmed.

SECTION 2.—REMEDIES IN EQUITY.

BRACKEN v. KENNEDY et al.

(Supreme Court of Illinois, 1842. 4 Ill. 558.)

CATON, J. This was a bill in chancery, filed in the La Salle circuit court by the complainant against the defendants, for an account among partners. The bill states that in July, 1837, the complainant and defendants entered into partnership as canal contractors, and as such partners contracted with a canal company in Virginia for the construction of section 120 of their canal, and that they completed said section 120 in August, 1838; that during the progress of the work the complainant and Brady had the principal management of its construction, while most of the time Kennedy was absent; that at the same time Kennedy had an individual contract for the construction of sections 118 and 119 of the same canal, and Kennedy employed the complainant to superintend the completion of these sections; that this individual contract of Kennedy was unprofitable, and in the course of its progress he became indebted to the copartnership section, 120, to about $8,000 for work and labor expended on sections 118 and 119; that the whole estimate for the company section, 120, was $32,320.90, including the work done on Kennedy's individual sections, and that

the costs of the same were $23,738.82, leaving a balance of profits to be divided among the partners of $8,137.98; that the complainant has accounted with and paid over to Brady his third of the said profits; and that there is now due from Kennedy to the complainant the sum of $3,959.03, arising from said partnership transactions; that Kennedy has drawn estimates on the works, and has drawn his last on his individual contracts; that no account has been taken or rendered between the said partners; and that Kennedy refuses to account. The bill prays that an account may be taken, etc.

To this bill a demurrer was filed, which was sustained, and the bill dismissed.

The first assignment of error is upon the decision of the court in sustaining the demurrer, and this is the principal question in the case.

In matters of controversy or difficulty between partners, it is now most usual, and by far the most convenient, to resort to a court of equity for their final adjudication and settlement. The practice of this court is much better adapted to unravel and definitely settle such complicated questions as frequently arise among partners than a court of law; and it is now one of the most usual proceedings to be met with in courts of equity. It is not unusual that almost the entire proof of the merits of a case between partners is locked up in the bosoms of the parties themselves, or is contained in books and papers in the possession of one or the other party, and this court can afford the only key to the disclosure of the one or the production of the other. Here either party may compel the other to purge his conscience on oath and declare the truth; and the court will compel the production of all such papers and books as may be necessary to elucidate the rights and liabilities of the parties. It is for this reason that courts of equity have frequently exercised a concurrent jurisdiction with courts of law in long and intricate accounts, running on both sides, between parties who are not partners and have no interests in common.

It is true that courts of law still pretend to afford a remedy, in case of difficulty between partners, by the action of account; but it is so incomplete and unsatisfactory that it is now nearly obsolete, and the complaining partner almost universally lays his complaint before a court of chancery, where he finds a prompt and efficient remedy, from the superior facilities which it possesses of doing complete justice between the parties.

In a bill of this character the existence of the partnership, the transaction of business by the firm, and no account among its members, are prominent features, and where they all appear I am not prepared to say that the bill ought not in all cases to be retained. In this case the bill shows that there was a special and limited partnership, the particular object of which is stated in it, as well as the nature and amount of the business transacted by the firm, and that no account has been had between the complainant and the defendant Kennedy, who refuses to account. Here, then, is such a case as requires the interposition of

a court of chancery to settle and adjust the rights and claims of the several partners. It is true that the bill states that the complainant and Brady have settled as between themselves, and that the complainant has succeeded to all of the rights and interests of Brady in the partnership business; but this does not make it the less necessary that an account should be had between the complainant and Kennedy, to settle their respective rights; and to accomplish this it was necessary to make Brady a party to the bill. The bill also states that the partnership advanced to Kennedy, one of its members, in work and labor, etc., to the amount of some $8,000, which is nearly the extent of the partnership profits, thus showing substantially that Kennedy had received nearly all of the profits of the work on section 120. In what way could this be recovered back by the other members of the firm, or in what way could he be compelled to account for these advances, unless by the mode here adopted? One member of a partnership cannot sue the firm at law for advances made by him to the joint concern; nor can the firm sue an individual partner for anything that he may have drawn out of the joint stock or proceeds, no matter how much more than his share it might have been; and the reason is that one man cannot occupy the double position of plaintiff and defendant at the same time. 1 Story's Eq. 616. The aid of this court is just as necessary to settle the account of these advances as it is to settle the accounts arising out of the immediate transactions of the special business of the partnership.

The bill, then, being sufficient in substance, although not so particular as might be desirable, the demurrer should have been overruled. The decision of the court below is reversed, and the cause remanded, with directions that the complainant be permitted to amend his bill, if he thinks proper, and with leave for the defendant to answer.

Decree reversed.

LORD et al. v. HULL.

(Court of Appeals of New York, 1904. 178 N. Y. 9, 70 N. E. 69, 102 Am. St. Rep. 484.)

Action by Austin W. Lord and others against Washington Hull and Kenneth M. Murchison, Jr. From a judgment of the Appellate Division (80 App. Div. 194, 80 N. Y. Supp. 321), affirming a judgment for plaintiffs and Murchison (37 Misc. Rep. 83, 74 N. Y. Supp. 711), defendant Hull appeals.

It is alleged in the complaint that in September, 1894, the plaintiffs and the defendant Hull formed a copartnership to carry on business as architects in the city of New York, at first for a definite period, but finally until certain work was finished, and that the time for the termination thereof was uncertain, owing to the large number of unfinished contracts on hand. The powers, rights, and obligations of the co-

partners were in all respects equal. On the 18th of February, 1896, a written agreement was made in the name of the firm with Kenneth M. Murchison, Jr., containing a promise "to pay him ten per cent. of the gross commissions for the work on the residence of William A. Clark," not yet completed. The rest of the complaint (Murchison not having been a party when it was drawn) is as follows: "That a disagreement has arisen between the plaintiffs and defendant as to the payments which have been and are still to be made to the said Kenneth M. Murchison, Jr., and as to the obligations of the copartnership to the said Murchison, Jr., under the contract entered into by said copartners and said Murchison, being the agreement of February 18, 1896 (Schedule B, hereto annexed), hereinbefore set forth; that the defendant has withdrawn from the funds of the copartnership and has appropriated to his own use the sum of $945, which was a sum largely in excess of any and all sums to which he was entitled at the time of such withdrawal, and threatens to withdraw from the funds of the said copartnership from time to time hereafter such sum or sums as he may deem himself entitled to, irrespective of the rights of the plaintiffs; that the plaintiffs do not desire to dissolve the copartnership existing between them and the defendant, for the reason that the plaintiffs believe that the contracts entered into between such copartnership and William A. Clark, the owner of one of the works set forth in Schedule C, hereto annexed, and yet incomplete, require the exercise of the professional skill and ability of all the members of the said firm, which could not be secured upon a dissolution of the said copartnership, and that loss and damage would be sustained by the plaintiffs if such contracts were broken by the dissolution of said copartnership; that the plaintiffs are without an adequate remedy at law." There was no allegation that Hull was insolvent, or that there was any occasion for an accounting, except with reference to the Murchison contract. The relief demanded was an accounting as to all copartnership affairs to date, and an adjudication of the rights and obligations of the parties under their copartnership agreement and under the contract with Murchison. There was also a prayer for general relief, but none for an injunction, either temporary or permanent. The defendant Hull alleged in his answer that the agreement with Murchison was made without authority, and was not binding on the firm; that the plaintiffs had unlawfully paid him thereon large sums of money out of the funds of the firm; and that they threaten to continue such payments. A few days before the action was tried, Murchison moved at Special Term, on notice to the parties, to be made a party defendant, with leave to serve an answer upon both the plaintiffs and the defendant. The motion, although opposed, was granted, and no one appealed from the order. The answer of Murchison, served on all the parties, after certain denials, set forth, "by way of an equitable counterclaim," the agreement between himself and the firm, and alleged that the firm owed him the sum of $2,100 and upwards thereon. He asked for an

accounting to ascertain the amount received by the firm as commissions from said Clark, and for judgment against the plaintiffs and the defendant Hull for the amount found due him, with other relief. The last set of copartnership articles provided "that upon completion of the works above mentioned a true and final accounting shall be made by the parties to this agreement each to the others, and all the property of the firm * * * shall be equally divided between them." Upon the trial it appeared from the testimony of the plaintiffs that there was "nothing to have an accounting about, except Mr. Murchison's share of those commissions." The trial judge found the facts as alleged by the plaintiffs and the defendant Murchison, and the decree entered held the Murchison agreement valid and binding upon the firm, interpreted its meaning in accordance with their contention, and awarded judgment in favor of the plaintiffs and against the defendant Hull for $1,415.27, with costs, and in favor of the defendant Murchison against the plaintiffs and the defendant Hull for the sum of $3,000, besides costs. Upon appeal by Hull to the Appellate Division, the judgment was in all things affirmed—two of the justices dissenting—and he now comes to this court.

VANN, J. This action was brought by two copartners against the third for an accounting, without a dissolution, and it is not surprising that a challenge is interposed to the jurisdiction of the court. The contract of copartnership has existed as long as the common law, and a vast amount of business has been transacted by persons working together under this relation. The law upon the subject is founded on the custom of merchants, who have thus, in effect, made their own law, yet we find no well-considered case which approves of such an action as the one now before us. While the novelty of an action is by no means conclusive against it, still it is suggestive, when the history of the law relating to the subject shows many occasions and few efforts.

The general rule is that a court of equity, in a suit by one partner against another, will not interfere in matters of internal regulation, or except with a view to dissolve the partnership, and by a final decree to adjust all its affairs. Story on Partnership, § 229; Lindley, 567; Gow, 114; Parsons, § 206; Bates, § 910; Collier, § 236. It is not its office "to enter into a consideration of mere partnership squabbles" (Wray v. Hutchinson, 2 Mylne & Keen, 235, 238), or "on every occasion to take the management of every playhouse and brewhouse" (Carlin v. Drury, Vesey & B. 153, 158). If the members of a firm cannot agree as to the method of conducting their business, the courts will not attempt to conduct it for them. Aside from the inconvenience of constant interference, as litigation is apt to breed hard feelings, easy appeals to the courts to settle the differences of a going concern would tend to do away with mutual forbearance, foment discord, and lead to dissolution. It is to the interest of the law of partnership that frequent resort to the courts by copartners should not be encouraged, and they should realize that, as a rule, they must settle their own differ-

ences, or go out of business. As a learned writer has said: "A partner who is driven to a court of equity, as the only means by which he can get an accounting from his copartners, may be supposed to be in a position which will be benefited by a dissolution; in other words, such a partnership as that ought to be dissolved." Parsons on Partnership (4th Ed.) § 206. "If a continuance of the partnership is contemplated," as another commentator has said, "or if an accounting of only part of the partnership concerns is allowed, no complete justice can be done between the partners, and the fluctuations of a continuing business will render the accounting which is correct to-day incorrect to-morrow; and to entertain such bills on behalf of a partner would involve the court in incessant litigation, foment disputes, and needlessly drag partners not in fault before the public tribunals." 2 Bates on Partnership, § 910. Judge Story declared that "a mere fugitive, temporary breach, involving no serious evils or mischief, and not endangering the future success and operations of the partnership, will therefore not constitute any case for equitable relief. * * * It is very certain that, pending the partnership, courts of equity will not interfere to settle accounts and set right the balance between the partners, but await the regular winding up of the concern." Story on Partnership, §§ 225, 229.

While a forced accounting without a dissolution is not impossible, it is by no means a matter of course, for facts must be alleged and proved showing that it is essential to the continuance of the business, or that some special and unusual reason exists to make it necessary. Thus, Mr. Lindley, upon whom reliance was placed by the courts below, mentions three classes of cases as exceptions to the general rule: "(1) Where one partner has sought to withhold from his copartner the profits arising from some secret transaction; (2) where the partnership is for a term of years still unexpired, and one partner has sought to exclude or expel his copartner, or drive him to a dissolution; (3) where the partnership has proved a failure, and the partners are too numerous to be made parties to the action, and a limited account will result in justice to them all." The plaintiffs claim that this case belongs to the second class, and the courts below have so held; but, as we think, it does not come under any head of Mr. Lindley's classification, which is correct as far as it goes, and it goes as far in the direction of the plaintiffs' theory as any just classification that can be made.

There is neither allegation nor evidence that Hull tried to exclude or expel the plaintiffs, or to drive them to a dissolution, or that he did anything in bad faith or with an ulterior purpose. The controversy was confined to one point of difference—the Murchison contract—which was a matter of internal regulation. There was no dispute about anything else. The plaintiffs claimed that the contract bound the firm, and that it included all work done or to be done for Mr. Clark, while Hull claimed that it did not bind the firm, and that, if it

did, it embraced only a part of that work. There was no difference in the computation of balances, or claim that the articles had been violated by either side, except with reference to that contract. The plaintiffs insisted that Hull had drawn out more than his share of the profits, because he drew one-third of the income without leaving one-third of the part going to Murchison, and that thus there was a balance against him. Hull claimed that the plaintiffs, in paying anything to Murchison, wasted the assets of the firm, and thus there was a balance against them. When the interlocutory judgment was made, the parties at once stipulated the respective balances on the basis of that decree, and thus obviated a reference, so that final judgment was entered without delay. Neither party desired an accounting, except as an excuse to sustain or defeat the Murchison contract. Exclusion from a small portion of the profits, paid or withheld in good faith on account of that contract, was not exclusion from the affairs of the firm, yet an accounting was sought only as a means of settling the dispute over that particular subject, which related simply to a detail in the management of the business. No discovery was asked for. There was no claim that Hull was insolvent, or that he had suppressed any fact, or had made secret profits, or had been guilty of bad conduct, or that the books had not been properly kept, or that the plaintiffs had been denied access to the books. There was no evidence that any partner had refused to give an account of all moneys received by him, or that there was error or omission of any kind in the accounts of the firm, except as limited to the Murchison agreement. It was easy to test the validity of that contract by simply withholding payment, forcing Murchison to sue, and raising the question by answer. That was not an equitable, but a legal question. Murchison's claim did not differ from that of any firm creditor, except that the partners were at odds over its validity. "No action can be maintained by one partner against the other in respect to particular items of account pertaining to the partnership business." Thompson v. Lowe, 111 Ind. 274, 12 N. E. 477.

An accounting without a dissolution has never been allowed, under the circumstances of this case, by any court in this country or in England, so far as we can learn from the authorities cited by counsel or discovered by ourselves. A brief review of the leading cases will show that the principle upon which they rest has no application to the facts of the case before us. In Fairthorne v. Weston, 3 Hare's Ch. R. 387, the plaintiff bought into the business of an attorney, paying £700 down, and agreeing to pay 700 more at the end of five years, when the defendant was to retire, and the business was to belong to the plaintiff. During the five years the parties were to be copartners, sharing the profits and expenses equally. After a while the defendant, for the fraudulent purpose of getting rid of his contract, received money, and refused to account for it, excluded the plaintiff from all knowledge and control over the business, used insulting language toward him, and violated the copartnership agreement in other ways,

and all in order to bring about a dissolution. A bill filed for an accounting, without a dissolution, was sustained upon the ground that the defendant was violating the contract in order to compel the plaintiff to submit to a dissolution upon very injurious terms, and that the court had power to support as well as dissolve a partnership. In Richards v. Davis, 2 Russell & M. 347, a copartnership for a long term had not expired, and the acting partner excluded the others "from the means of ascertaining the state of the partnership affairs." A bill for an accounting, and to permit the plaintiffs "to have access to all the books of the partnership," was sustained; but the court refused to make an order "for carrying on the partnership concerns, unless with a view to dissolution." It is claimed that this case was overruled by Knebell v. White, 2 Younge & C. Exch. 15, where it was held that a bill for an account of partnership transactions must pray for a dissolution, or the court could not take jurisdiction. From the fragmentary report of Harrison v. Armitage, 4 Mad. 143, it appears that the defendant denied that there was any partnership; and the court so held, but remarked orally that one partner might file a bill against another for an account without asking for a dissolution, although not in a case of interim management. The remark was obiter, and so limited as not to include the case we are considering, yet it is one of the few authorities relied upon by those who claim that courts of equity should open their doors to admit quarreling copartners. In Knowles v. Houghton, 11 Vesey, Jr., Ch. R. 168, the existence of the partnership was denied by the defendant, who claimed that the plaintiff "was merely employed as a clerk." An accounting was granted without a dissolution, the object being to establish the partnership. In Lascomb v. Russell, 4 Simons, 8, there was a partnership for seven years, "and so from seven years to seven years, till determined by notice." After the first period had expired, and one year of the second, a bill was filed for an account of the profits, upon the allegation that no settlement had been made for the last three years. In dismissing the bill, the court said: "With respect to the law of this court upon this subject, there is no instance of an account being decreed of the profits of a partnership on a bill which does not pray a dissolution, but contemplates the subsistence of the partnership. * * * With respect to occasional breaches of agreement between partners, when they are not of so grevious a nature as to make it impossible that the partnership should continue, the court stands neuter; but when it finds that the acts complained of are of such a character as to show that the partners cannot continue partners, and that relief cannot be given but by a dissolution, the court will decree it, although it is not specifically asked. Here a dissolution is not prayed for, and, if the court were to do what is asked, it would not be final." Under similar circumstances, Lord Eldon dismissed the bill in Forman v. Humfray, 2 Ves. & B. 328; observing "that, if a partner can come here merely for an account pending the partnership, there seems nothing to prevent his

coming annually." In Taylor v. Davis, 4 Law J. (N. S.) 18, an injunction was granted, restraining the defendant from retaining in his sole possession, and excluding the plaintiff from access to, a book kept by the firm, and indispensable to the business. The book had been abstracted by the defendant, and he had threatened to burn it. In Marshall v. Colman, 2 Jacob & W. 266, the court declined to restrain the defendant from violating the articles of partnership, in refusing to use the name of the plaintiff as a part of the firm name in the transaction of firm business. The lord chancellor said: "It would be quite a new head of equity for the court to interfere where one party violates a particular covenant, and the other party does not choose to put an end to the partnership. In that way there may be a separate suit and a perpetual injunction in respect of each covenant, and that is a jurisdiction that we have never decidedly entertained." In Knebell v. White, 2 Younge & C. 15, previous conflicting decisions were considered, and the court said: "It may now, therefore, be considered as settled that, in the case of ordinary trading partnerships, an account of partnership transactions must be consequent upon a dissolution of the partnership." These cases illustrate, if they do not exhaust, the instances where the courts of England have interfered, or refused to interfere, when a dissolution of the firm was not asked. In this country the question does not appear to have been directly decided, at least not in this state. It was not involved in Sanger v. French, 157 N. Y. 213, 51 N. E. 979, nor in Traphagen v. Burt, 67 N. Y. 30, as will appear from an examination of the facts. The primary object of those actions was to establish a partnership with reference to a particular adventure, and they turned mainly on the existence and effect of an oral agreement between the parties. Our courts, and especially those having jurisdiction under the laws of Congress, have sometimes interfered by injunction in a flagrant case of danger and injustice, although no dissolution of the firm was contemplated. Rutland Marble Co. v. Ripley, 10 Wall. (U. S.) 339, 19 L. Ed. 955; Leavitt v. Land Co., 54 Fed. 439, 4 C. C. A. 425. This is quite different from an action for an accounting without a dissolution, where no especial reason is alleged or proved to show that one is necessary, or to authorize a departure from the general rule.

A court of equity will not take cognizance of an action for an accounting as a mere incident to the settlement of a solitary matter in dispute between partners, when it is not vital to either party or to the business, and dissolution is not sought. Actions to establish a partnership, the existence of which was denied by the partner in control to give a partner access to the books after persistent refusal, or to permit him to take part in the business from which he had been excluded, are founded on intentional and continuous wrongdoing, which, unless arrested, might subvert the partnership. When one party seizes or absorbs the entire business, or usurps rights of his copartner which are essential to his safety or the safety of the firm, or persists in miscon-

duct so gross as to threaten destruction to the interests of all, the court may intervene to restore the rights of the innocent party, or to rescue a paying business from ruin. Extreme necessity only, however, will justify interference without a dissolution. There was no sufficient reason for an appeal to a court of equity in the case under consideration. There was no equity in the bill as filed by the plaintiffs, and none in the case made for them by the evidence. The defendant Murchison had an adequate remedy at law, and he can take nothing from his intrusion into the litigation, under the circumstances, for the questionable order admitting him as a defendant did not create a cause of action, nor add to the jurisdiction of the court. All the parties should be put back where they were before the action was commenced, and hence it is our duty to reverse the judgments below and dismiss the complaint, with costs to the defendant Hull against the plaintiffs and the defendant Murchison.

GRAVES, C. J., IN BUCK v. SMITH.

(Supreme Court of Michigan, 1874. 29 Mich. 166, 18 Am. Rep. 84.)

Now, what is the real essence of the case made by this bill? What is the arrangement the court is asked to carry out? It is an agreement, according to the representation of complainant, between himself and the defendant, by which the latter agreed to convey an undivided interest in real and personal property held by defendant in common with third persons, and that the complainant should, for an indefinite time, become a partner with the defendant and such third persons in operating the property; that the defendant should advance from time to time the complainant's quota of the funds necessary for the business and the improvement of the property; that the complainant should have the right to manage and direct the business and the improvements; and that he would employ his time, skill, judgment, and experience in the direction and supervision of the property and business; and that the purchase price of his proprietary share and the amount advanced for his benefit in carrying on the business should be paid by his skill and services in the concern and the gains obtained in the enterprise. * * *

It is extremely plain that the court cannot assume to enforce the performance of daily prospective duties, or supervise or direct in advance the course or conduct of one who is to control and manage in the interest of a firm in which he is to stand as a member, and where, too, the stipulated arrangement as plainly set forth contemplates that his personal skill and judgment shall be applied and govern according to to the shifting needs of property and business. No court is competent to execute such an arrangement.

PIRTLE v. PENN.

(Court of Appeals of Kentucky, 1835. 3 Dana, 247, 28 Am. Dec. 70.)

ROBERTSON, J. Henry Pirtle filed a bill in chancery against Shadrack Penn, alleging that they were partners in the publication of Pirtle's Digest; that Pirtle, as author, was to furnish the manuscript, and Penn, as mechanic, was to execute the printing and binding, and each to be entitled to half of the proceeds to be derived from the sale of the books; that Penn was not bound to commence the printing unless he should be satisfied that the public patronage would be satisfactory and sufficient; that the state subscribed for 500 copies, and that afterwards Penn had printed 2,000 copies and bound about half of them, but that, after dividing equally the gross sum paid by the state for 500 copies, he had refused to permit Pirtle to have any control over the books, or any participation in the sale of them—alleging for the first time, that he was entitled only to half of the net profits, after deducting the cost of the printing and binding, which had not yet been wholly reimbursed; and, lastly, that Penn was insolvent, and therefore praying for an account of sales which had been made, and for an injunction restraining further sales, and for the appointment of a receiver.

Penn, in his answers to the bill and amended bill, admitted the partnership as alleged, with only one material qualification, and that is that his personal supervision and interest on his capital expended in the publication were, by the agreement, to be set off against Pirtle's skill and labor in preparing the manuscript, and that the net profits only were to be divided, after reimbursing the amount expended in the printing and binding and in the purchase of materials. He denied that he was insolvent, and, after exhibiting a general account, insisted that Pirtle had received about as much as he had himself received.

The circuit court having, on final decree, dismissed the bill, this appeal is prosecuted to reverse the decree.

As there was no prayer for a dissolution of the partnership, interim management, by a receiver or otherwise, under the control or direction of the court, was not authorized by the established rules and usages of courts of equity. Gow on Part. 120, 139; Cary, 32. And it has been said that without a prayer for dissolution a court of equity will not entertain a bill for an account, because such bills might be annual, or of indefinite recurrence. But both principle and authority tend to the conclusion that a bill for an account between copartners may be maintained without a prayer for a dissolution of the partnership, if there be any good reason for compelling an account and settlement. Cary, 34; Gow, 120–136. A court of equity may, moreover, compel a specific execution of a partnership contract, and may sometimes enjoin a partner from persisting in improper conduct, jeoparding the rights or derogating from the power or authority of his copartner,

and when the latter, if he can be protected and secured by injunction, does not desire a dissolution, but prefers a continuation of the partnership according to the spirit and end of the association. In this case, though there is no prayer for dissolution, yet, as Penn has been selling the books and does not deny that he refuses to permit Pirtle to control or participate in the sale of the residue, we think the circuit court had power to decree, and ought to have decreed, some relief, if the allegations of the bill as to the terms of the partnership be true. [After construing the partnership agreement:] From this view of the case, it would seem that, under the circumstances of this case, Pirtle is entitled to a decree for an account, and for securing to him his equal control over the books, and correspondent participation in the sale or disposition of them, by a partial injunction or otherwise, so as to effect that end most securely and appropriately; and consequently the absolute dismission of the bill was improvident. Wherefore it is decreed and ordered that the decree of the circuit court be reversed, and the cause remanded.

SHANNON et al. v. WRIGHT.

(Court of Appeals of Maryland, 1883. 60 Md. 521.)

The appellee, together with the appellants, were copartners in the business of manufacturing and dealing in metals in the city of Baltimore, under the firm name of Shannon, Wright & Co. A bill was filed by the appellee against the appellants, asking for an injunction and the appointment of a receiver. The case is further stated in the opinion of the court.

Ritchie, J. This is an appeal from an order of the circuit court of Baltimore City appointing a receiver and granting an injunction. Our duty, therefore, is simply to determine whether the case stated by the complainant was one which justified the passage of the order appealed from. Without pausing to dwell upon those averments of the complainant which impute fraudulent misrepresentations to the defendants as to the value of the firm's assets and its business, by which he was induced to enter into a partnership with them, which has disproportionately engulfed his means and exposed him to great loss, we find in the specific allegations of clause 10 of the bill ample ground for the equitable interposition he has invoked. That clause is as follows:

"And now your orator charges that debts are due by, and suits are pending against, the firm, and that the defendants, having the money of the firm in their possession, refuse to apply it toward the payment of said debts; that they refuse to give any money to your orator; that they refuse to permit your orator's counsel to examine the books of the firm; that they refuse to allow a competent bookkeeper, selected by your orator, to examine the books of the firm; that

in order to anticipate debts owing to the firm, and thus get the firm's money in their pockets, they have drawn drafts in the name of the firm upon their customers, and procured the same to be discounted by their lawyer and others at exorbitant rates of interest; that without the knowledge or consent of your orator they have given notes of the firm in settlement of debts not owing by the firm, one of said debts being for clothing purchased by D. R. Shannon and John T. Shannon individually; that without the knowledge or consent of your orator the said D. R. and John T. Shannon have offset their own debts by sales of merchandise of the firm of Shannon, Wright & Co.; that they have no tangible property outside of their interest in said firm; that they represent themselves to be three stubborn brothers, and express their intention of litigating the matters in controversy by means of the firm's money until they have ruined your orator; that the said D. R. Shannon and John T. Shannon refuse to return the money which has been advanced to pay their debts; that defendants declare themselves to be unwilling to continue said partnership, even if your orator was willing, and yet they utterly refuse to dissolve the partnership; that they threaten to make contracts in the name of the firm, knowing they cannot be carried out, which contracts, if made, will render your orator liable in damages; that judgments will shortly be entered against the firm, and your orator damaged, unless the money in the hands of the defendants be applied to the payment of the notes sued on, as above stated; and your orator charges that unless immediate relief be given by way of an injunction and receiver, which he is advised is the proper remedy, he will be reduced from a reasonable competence to poverty."

There is evidently here set out such a case of alleged fraud and imminent danger to the complainant's interest in the partnership property as justifies a receiver and an injunction—proceedings which do not determine the rights of the parties, but simply protect the property from injury or destruction until those rights can be further inquired into or adjudicated. The order appealed from must be affirmed.

Order affirmed, and cause remanded.

KATZ v. BREWINGTON.

(71 Md. 79, 21 Atl. 139.)

See ante, p. 433, for a report of the case.

SUTRO v. WAGNER.

(Court of Chancery of New Jersey, 1873. 23 N. J. Eq. 388.)

There was notice on part of defendant of a motion to dissolve an injunction heretofore granted in this suit, and a notice on part of complainant for the appointment of a receiver. By consent, both motions were argued together.

ZABRISKIE, Ch. This suit is by one partner against the other for a dissolution, an account, and a receiver. The grounds of complaint are: A failure by the defendant to fulfill his partnership obligations, his neglect and refusal to proceed with any efficiency in the business, his fraudulent appropriation of the funds, and his fraudulent voluntary conveyance of his separate property to his son, for the purpose of placing it beyond the reach of creditors of the firm, so as to leave the complainant's separate property liable for the debts of the firm beyond its assets, and giving notice of such transfer to the mercantile agency, for the purpose of ruining the credit of the firm.

The answer of the defendant denies some of these charges, but not all. The voluntary transfer of his separate property, and the notice of it to the mercantile agency, are not denied. These, in connection with some other matters not denied, are sufficient to show that the defendant had deliberately resolved to break up and ruin the business of the firm; and the personal relations of the two partners are such that they can never carry on the business together to advantage. The injunction must be retained, and a receiver appointed.

The motion to dissolve is denied, with costs.[1]

[1] In McElvey v. Lewis, 76 N. Y. 373 (1879), in an action for the dissolution of a partnership and the appointment of a receiver, it was said: "In the absence of any provision in the partnership agreement as to the division of property or manner of closing its affairs, it was proper to appoint a receiver. Law v. Ford, 2 Paige (N. Y.) 310; Martin v. Van Schaick, 4 Id. 479. And Lord Eldon in Goodman v. Whitcomb, 1 Jac. & W. 569, says: 'If the court can see that a dissolution must be declared, it follows very much of course that a receiver must be appointed.' This is the general rule, and no sufficient reason is suggested for making this case an exception. It is doubtless true, as the appellant argues, that a receiver will not be appointed for the mere reason that the partners quarrel; but that is because this will not of itself be a sufficient ground for severing the connection between them. Collyer on Partnership, 197. In the case before us the partnership has been dissolved, and the defendant's answer shows that there is property concerning the division of which the parties have not agreed, and other property, the lease and good will, in regard to which there is a difference; the defendant claiming the whole interest in both to the exclusion of the plaintiff."

SECTION 3.—ACCOUNTING AND DISTRIBUTION.

GROTH et al. v. KERSTING et al.

(Supreme Court of Colorado, 1896. 23 Colo. 213, 47 Pac. 393.)

HAYT, C. J. The defendants in error, Fritz Kersting and August Wilmsmeier, commenced suit against plaintiffs in error, Louis Groth and Ferdinand B. Becker. This action was numbered 13,115 in the district court. The complaint in the suit, as originally instituted, contained two causes of action. The first, which was directed against the defendant Groth alone, is an action by two partners against the third member of the firm for an accounting. The second cause of action was against both of the defendants, upon an account stated. At the time of the institution of this suit, an attachment was issued in aid thereof, and sustained upon final hearing. To the original complaint a demurrer was interposed, and sustained. Thereafter the complaint was amended, and the first cause dropped therefrom. This first cause of action was subsequently made the basis of an independent suit, designated in the district court as No. 13,900. After the issues were joined in the two causes, they were consolidated, and referred to I. E. Barnum, as referee, to take testimony, and report findings. As a result of the proceedings had before the referee, the plaintiffs in both cases were successful. Exceptions to the report were in due time filed, and overruled by the court. In accordance with the findings of the referee, the district court rendered judgment for the plaintiffs for the sum of $8,751.54, against both defendants, and an individual judgment against Groth alone for the sum of $1,936.70. From this judgment a writ of error was sued out from the Court of Appeals, in which court the judgment of the district court was in all things affirmed. See Groth v. Kersting, 4 Colo. App. 395, 36 Pac. 156. From this latter judgment the cause is brought here by error.

It is claimed that the referee's report, which formed the basis of the decree in the district court, as well as that of the Court of Appeals, is manifestly erroneous, in that it fails to provide for the repayment to each partner of his contribution to the business. Undoubtedly, the usual order of distribution of the assets of a copartnership upon dissolution is as stated by counsel, to wit: (1) Payment of the debts or liabilities due third persons; (2) repaying to each partner his advances; (3) repaying to each partner his capital; (4) division of the balance as profits. While this is the usual order, it may be altered by agreement of the parties, and in this case we think, from the evidence and the conditions under which the copartnership was formed and the

firm business transacted, the referee correctly determined that the amount contributed by the several partners was to be considered as assets of the firm, and to be distributed accordingly. In accordance with the terms of the agreement, Kersting and Wilmsmeier were to devote their time and attention to the joint enterprise, and contribute only $3,650.50, while Groth contributed $8,000, although he had but a one-third interest in the business. This disproportionate amount was, we think, put in by Groth against the lease theretofore secured by Kersting & Co., and as an offset to their labor and services in the management of the business, with the further benefit to Groth resulting from an agreement to furnish brick for his building contracts at a lower price than they could be purchased for in the market. So, we conclude that it was not error for the referee to treat these several items as assets of the copartnership, to be divided between the partners according to their interest in the copartnership, without regard to the ratio of the original contributions.

Among the credits allowed Kersting & Co. is one for hauling brick. It is claimed that in this there is error, because the bricks were hauled by teams belonging to the copartnership. We do not so understand the evidence. On the contrary, the referee gave credit only for the money paid to others for hauling. Mr. Kersting says: "Brick hauling, $1,242.40; that is, teams which hauled bricks, and we paid them for hauling." In the complaint it is alleged that the profits of the brick business were $9,731.68, for which the firm of Kersting & Co. is accountable, while the net profits of the business, as found by the referee, were only $7,828.60. It is urged that this is in violation of the rule binding parties by the allegations of their pleadings. This is not so, for the reason that this allegation of the complaint is denied by the answer, and evidence was taken upon the issue thus made. The referee found that the price charged for brick by Kersting & Co. was too high, and reduced the amount, thereby reducing the firm profits correspondingly. There was no error in this, but Kersting & Co. were improperly allowed, as part of the expenses of the business paid by them, the sum of $3,650.50, this being the value of the lease, horses, wagons, tools, brick, etc., contributed to the firm by Kersting and Wilmsmeier at the inception of the enterprise. The contribution to the firm, under the findings of the referee, became joint property or firm assets; and neither party should have been given credit for either of the amounts in the final settlement, except as the same may result from a division of the firm assets. The referee acted upon this rule so far as Groth is concerned, but adopted a different rule as to Kersting and Wilmsmeier. This was not called to the attention of the court in any of the briefs filed or oral arguments heard prior to writing the first opinion, but was first mentioned in the petition for rehearing; but the error is manifest, and the correction will now be made. With this change the account may be stated as follows:

Kersting & Wilmsmeier in Account with Kersting & Co.

To collections for firm	$68,805 64
By expenses paid for the firm	63,716 37
Balance due	$ 5,089 27

Firm Assets.

Due from Groth & Becker	$ 8,751 54
Due from Kersting & Wilmsmeier, as above	5,089 27
Due from Louis Groth	8,000 00
Total	$21,840 81
Of this amount Kersting & Wilmsmeier are entitled to two-thirds	$14,560 54
Less their indebtedness to the firm, as above	5,089 27
Balance due Kersting & Wilmsmeier	$ 9,471 27

Kersting and Wilmsmeier are entitled to judgment for the amount due them, viz. $9,471.27. It is now conceded that Groth & Becker and Louis Groth may properly be considered as one and the same party so far as the settlement of this business is concerned. We will therefore not interfere with the judgment rendered against Groth & Becker for $8,751.54, but will correct the error by reducing the judgment against Groth from $1,936.70 to $719.73. The judgment of the Court of Appeals against Groth & Becker will therefore be affirmed, and the judgment against Groth reduced to $719.73; the costs in this court to be equally divided between the parties. The cause will be remanded to the Court of Appeals for further proceedings in accordance with this opinion. Judgment modified.

FOLSOM v. MARLETTE.

(Supreme Court of Nevada, 1897. 23 Nev. 459, 49 Pac. 39.)

BELKNAP, C. J. This is a suit for an accounting between partners, in which each demands a balance due from the other. The partnership was formed on the 29th day of September, 1880, and continued until the 27th day of May, 1890, when it was dissolved. Its business was that of contracting for the cutting of cord wood and logs, and the sawing of timber, to which the business of merchandising was subsequently added. They were equal partners. The district court ordered judgment in favor of respondent for the sum of $6,540.49. From the judgment and an order refusing a new trial, defendant has appealed. The assignment of errors will be considered seriatim. * * *

4. Respondent paid to the creditors of the firm, after it had discontinued business, a short time prior to its dissolution, the sum of $16,747.72. The district court allowed interest upon this sum amounting to the sum of $7,224.06. The money thus paid is properly treated as an advancement for the benefit of the firm. Lindley, in his work

upon Partnership, says: "An advance by a partner to a firm is not treated as an increase of his capital, but rather as a loan, on which interest ought to be paid; and, by usage, interest is payable on money bona fide advanced by one partner for partnership purposes, at least when the advance is made with the knowledge of the other partners." Volume 1, p. 390. The propriety of this charge admits of no question. The firm had no capital. It had been in the habit of paying interest at its banker's upon overdrafts for a long time. Appellant has not suggested in his testimony that this money was not advanced with his knowledge and acquiescence. Under these circumstances, the charge of interest is equitable. Baker v. Mayo, 129 Mass. 517; Morris v. Allen, 14 N. J. Eq. 44; Berry v. Folkes, 60 Miss. 576; Collender v. Phelan, 79 N. Y. 366.

5. On or about the 29th day of July, 1889, respondent, with consent of appellant, appropriated certain personal property belonging to the firm to his own use, charging himself therefor with the sum of $7,717.17 upon the books of the firm. There had been no agreement touching the valuation to be fixed on the property, and upon the trial, under the terms of a stipulation filed in the case by counsel, appellant objected to the price so fixed by respondent. This stipulation, among other things, provided "that a transcription of the firm books that had been introduced in evidence should be treated as a correct transcription, and as to all items and all balances appearing in said transcription, opposite to which is a red cross, such items and balances are disputed by defendant, S. H. Marlette." Accordingly, appellant, Marlette, did cause an "X" in red ink to be set opposite this item; thus indicating that he contested the valuation placed upon the property by the respondent, Folsom. Evidence was introduced touching the value of the property, and the fact was also shown that respondent had charged himself with $7,717.17 for it. Upon all of the testimony introduced, the court found as a fact that the value of the property was $5,000, and charged the respondent with that sum in the adjustment of the accounts. Appellant claims that respondent should be concluded by the value fixed by himself upon the books of the firm, and therefore respondent should have been charged with $2,717.17 more than the value fixed by the finding. It must be stated, as a matter of fact, that there was no objection to the introduction of testimony tending to establish a lower valuation than the charge made by the respondent. Appellant must have expected that the district court would have placed a greater valuation than that with which the respondent had charged himself, otherwise there was no reason for the objection being taken. When the contest upon the charge was inaugurated by the appellant, under the peculiar circumstances of the case, the question of the value of the property was reopened, and respondent had the right to establish a lesser value, as the appellant to establish a greater value. He took the risk, and must abide the result. As the respondent has been allowed interest upon the advance he made

for the benefit of the firm, it is only equitable that the appellant should be allowed interest upon the value of this property, fixed at $5,000, from the date of its appropriation by respondent.

6. Wages. Appellant absented himself from the locality where the firm operated a considerable portion of the time. Respondent charged him for his services for a portion of the time. The first item of this nature was charged during the winter of 1882–83, and amounted to the sum of $300. No contention is made touching this charge. During the year 1885, $1,050 was charged. The court allowed this charge after having deducted the charge for wages during the month of July of that year. The general rule undoubtedly is that one partner is not entitled to charge the other compensation for his services without special agreement. There was no special agreement in this case, and the majority of the court are in favor of the enforcement of this rule. One member of the court, however, dissents from this view; holding that as these charges were made during the course of business, as the books were accessible to appellant, and a statement containing these charges was delivered to him upwards of two years prior to the dissolution of the firm, and no objection having been made then or afterwards until this proceeding was commenced, he should be deemed to have acquiesced in the charge. The charge will be stricken out. The case will be remanded to the district court, with instructions to modify its judgment by disallowing respondent the $1,050 allowed as wages, and to allow him simple interest at the rate of 7 per cent. per annum, instead of 10 per cent. per annum, upon the advances made by him after they had ceased to do business together, and also allow appellant the same interest on the $5,000, the value of the property, from July 29, 1889. Under the circumstances of the case, the costs in the district court should not be allowed respondent; and that court will also correct its judgment by ordering each party to pay his own costs; the judgment, as corrected, to bear legal interest from date of original entry. The judgment thus modified and corrected is affirmed; each party to pay his own costs upon this appeal.

WHITCOMB v. CONVERSE.

(Supreme Judicial Court of Massachusetts, 1875. 119 Mass. 38, 20 Am. Rep. 311.)

Bill in equity by a partner in the late firm of Converse, Whitcomb & Co., against the other partners, James C. Converse, Walter Stanton, and Edward Blagden, to compel contribution to the losses incurred by the partnership. The partnership agreement provided for carrying on of a dry goods commission business on the following terms: Whitcomb was to contribute $50,000 to the capital, receive 7 per cent. on the same and 25 per cent. of the net profits. Converse was to con-

tribute $25,000, receive 7 per cent. interest on the same, and 25 per cent. of the net profits. Blagden and Stanton were each to contribute all their time to the business and each to receive 25 per cent. of the net profits. Whitcomb put in $25,000 of the $50,000 which he was to contribute. The partnership having been dissolved by mutual consent, a settlement of its affairs showed a loss of about $25,000. Blagden, at the time of the dissolution, was, ever since has been, and now is, insolvent and unable to pay any part of said loss. Stanton contended that he was not liable to make good any of the losses, and, if liable, he was not liable to make good any part of the share which Blagden ought to have contributed. The cause was reserved for the opinion of the court.

GRAY, C. J. In the absence of controlling agreement, partners must bear the losses in the same proportion as the profits of the partnership, even if one contributes the whole capital, and the other nothing but his labor or services. 3 Kent, Com. 28, 29. Whether a loss of capital is a partnership loss, to be borne by all the partners, depends upon the nature and extent of the contract of partnership.

If, as is not unfrequently the case in a partnership for a single adventure, the mere use of the capital is contributed by one partner, and the partnership is in the profits and losses only, the capital remains the property of the individual partner to whom it originally belonged, any loss or destruction of it falls upon him as the owner, and, as it never becomes the property of the partnership, the partnership owes him nothing in consideration thereof. Story, Part. §§ 27, 29; Heran v. Hall, 1 B. Mon. (Ky.) 159, 35 Am. Dec. 178.

But where, as is usual in an ordinary mercantile partnership, a partnership is created not merely in profits and losses, but in the property itself, the property is transferred from the original owners to the partnership, and becomes the joint property of the latter. A corresponding obligation arises on the part of the partnership to pay the value thereof to the individuals who originally contributed it. Such payment cannot, indeed, be demanded during the continuance of the partnership, nor are the contributors, in the absence of agreement or usage, entitled to interest; but if the assets of the partnership, upon a final settlement, are insufficient to satisfy this obligation, all the partners must bear it in the same proportion as other debts of the partnership. Julio v. Ingalls, 1 Allen, 41; Bradbury v. Smith, 21 Me. 117; Barfield v. Loughborough, L. R. 8 Ch. 1; In re Anglesea Colliery Co., L. R. 2 Eq. 379, 387, L. R. 1 Ch. 555; Nowell v. Nowell, L. R. 7 Eq. 538; In re Hodges' Distillery Co., L. R. 6 Ch. 51, 56; 1 Lindl. Part. (3d Ed.) 696, 827, 828. Only two cases were cited in the learned argument for the defendant Stanton in which opinions inconsistent with this view have been expressed. The one is Everly v. Durborow, 1 Leg. Gaz. Rep. 127, a nisi prius decision, with no reference to authorities, except an early edition of Lindley on Partnership, which has been corrected by the learned author, ubi supra, con-

formably to the adjudged cases. The other is Cameron v. Watson, 10 Rich. Eq. (S. C.) 64. That was a bill in equity to settle the affairs of a partnership, to which Cameron had contributed labor and Watson capital. The master, to whom the case was referred, allowed the claim of Watson for so much of the capital as he had not withdrawn during the continuance of the partnership, but disallowed his claim for interest thereon. Pages 68, 73. Cameron excepted to the allowance of Watson's claim for capital, and Watson excepted to the disallowance of interest. The chancellor, before whom the exceptions were heard in the first instance, overruled the exceptions of Cameron, and also that of Watson as regarded interest before the dissolution of the partnership, but sustained it so far as to allow him interest after the dissolution. Pages 88–90, 95, 96. The Court of Appeals, although in one part of its opinion appearing to discountenance Watson's claim for capital, ended by confirming the master's report in every particular. Pages 103, 107, 108. So that the final judgment, while it disallowed Watson's claim for interest, established his claim for capital, and was in exact accordance with our conclusion.

In the case at bar the partnership was not for a single enterprise, but for the transaction of a commission business in New York and Boston for a year. Converse and Whitcomb contributed the whole capital, in unequal proportions. Converse was to contribute "such time as he may be able to give," and Whitcomb and the other two partners, Blagden and Stanton, were each "to contribute all his time to the business." Those partners who contributed the capital did not contribute merely the use thereof, but the capital itself, and were by express agreement to receive interest thereon at rates specified in the articles of copartnership. The partners were by agreement to receive each one-fourth of the net profits, and by implication of law must share the losses in the same proportion. The capital contributed became the property of the partnership; and the partnership, consisting of all the partners, became liable to Whitcomb and Converse, respectively, for the amount of capital paid in by them.

Blagden, one of the partners, being insolvent and unable to discharge any part of the obligation, it must rest in equity upon the three solvent partners in equal proportions. Whitman v. Porter, 107 Mass. 522; 1 Lindl. Part. 789, 790.

Decree for the plaintiff accordingly.

RAYMOND v. PUTNAM et al.

(Supreme Judicial Court of New Hampshire, 1862. 44 N. H. 160.)

Bill in equity for the dissolution and an account of a partnership existing between complainant, Raymond, and the firm of Putnam & Chase, and the firm of Came & Palmer. The case was heard upon

the bill, answer, and proofs. Sufficient facts appear in the opinion. * * *

SARGENT, J. Article 2 of the partnership agreement provides that the capital stock of the Milford Plow Company shall be formed in the following manner: Each was to put in certain property therein specified which was agreed to be an equivalent for cash, to a certain amount for each member, as follows: Putnam & Chase, $1,875; J. G. Raymond, $1,625; Came & Palmer, $1,200; making a total capital of $7,700.

Article 3 provides that each member of the partnership may increase the amount he has in the capital stock at pleasure, and may diminish it, but not so that it shall be less than $1,200.

By article 4 each member of the partnership shall be entitled to interest upon the sum by which his share in the capital stock shall exceed the smallest share owned in said stock by any of said partners, and the other members shall be jointly liable for such interest.

It is provided in article 5 that the losses shall be borne equally and the profits equally divided between said partners, namely, one-third to Putnam & Chase, one-third to Came & Palmer, and one-third to Raymond.

Article 11 provides that at the close of the partnership an account shall be taken and stated, and the stock and property and the debts shall be divided among the partners in proportion to the share which each has in the capital stock, after paying the liabilities of the firm.

Article 12 explains that it is the intention of the parties to form a copartnership of only three members; the two firms constituting each but a single member of the new firm.

In regard to the formation of the partnership, its members originally, the adoption of the articles of agreement, and the terms of those articles there is no dispute. It also appears that the partnership was dissolved, by mutual consent, on the 8th day of October, 1853. * * *

It is admitted that Putnam & Chase were to collect the debts due the firm after its dissolution, were to take the plows returned at a fixed date, and close up the affairs of the company, which it appears they have done; and there is nothing to show that this has not been done properly and in good faith, nor are any of the charges of fraud or misconduct or mismanagement on the part of the defendants sustained by the evidence. It appears from the schedule annexed to the answer, and from the other evidence, that the defendants bought certain property of the firm at the time of the dissolution, for themselves alone and for themselves and Came, amounting to $3,168.02; that since the dissolution they have collected debts, as per schedule A, $2,206; debts collected of factors, as per schedule B, $1,226.41; doubtful debts collected, as per schedule F, $188.26; plows returned, as per schedule K, $434.84; making a total received by the defendants of $7,523.53. Deduct debts paid to third persons by the de-

fendants, including J. Raymond's execution, $3,888.67, and it leaves in the defendants' hands $3,634.86. But it appears that Chase has since his answer collected $13.30 and paid out $5.84, so that there should be added to the above the balance of $7.46, making the whole balance now in the defendants' hands $3,642.32. For this amount there should be deducted a reasonable commission for collecting the debts (but nothing upon the property bought of the firm, or on the plows which the defendants were to take at an agreed price) in schedule A, B, and F, and the $13.30 collected since the answer, amounting in all to $3,633.97; and upon this sum 2½ per cent. would be a reasonable commission, amounting to $90.85, which would leave a balance in the defendants' hands of $3,551.47. Came has also received since the dissolution $103.20, and Raymond has received since the dissolution $281.52, making the total assets now in the hands of the partners $3,936.19.

Let us next find the amount of capital stock of each partner at the time of the dissolution, calling all that each member had in the concern capital stock; the members remaining substantially the same from its commencement to its close. This capital stock will be found by adding to the amounts invested by each, at the commencement, the interest on the amount invested by him above the amount of $1,200; also by adding the amount added to this capital by the services rendered by each and amounts paid, and deducting therefrom the amount of the indebtedness of each to the firm for such articles as they had received during the same time. It appears that the account of each partner was kept in that way each year, and that nothing was divided during the existence of the company, and nothing was paid as interest on stock, or paid by the members of the copartnership for what they received from the firm. It appears that the accounts kept in this way up to August 1, 1852, showed that the capital stock of each, including the whole original investment, was as follows: Putnam & Chase (including Obed Chase), $6,476.77; J. G. Raymond, $2,468.22; Came & Palmer (represented by Came), $1,387.56.

But Chase, in his deposition (cross-interrogatory No. 16), states the amount due each partner, October 8, 1863, the day of the dissolution, and including the whole of the original investment of each, but exclusive of interest from August 1, 1863, as follows: Putnam & Chase (including Obed Chase), $6,424.17; then taking the average amount between August 1 and October 8, 1863, and casting interest upon the excess above $1,200 for two months and seven days, and it gives as interest, $58.63, making their whole investment, October 8, 1863, $6,482.80. He also states in the same way the investment of Raymond, October 8, 1863, at $2,550.72; casting interest as before on average capital over $1,200 for two months and seven days, $14.62; Raymond's whole investment, October 8, 1863, $2,565.34. He also states in the same way the investment of Came, October 8, 1863, at $1,433.56; casting interest as above on his average capital above

$1,200 for two months and seven days, $1.35; Came & Palmer's whole investment, October 8, 1863, $1,135.91. Adding these three total amounts of investment together, we have, as the total investments of all the partners, October 8, 1863, $10,184.05.

This is as near an approximation to accuracy as I am able to make from data given in the evidence; but it can only be an approximation, of course. We thus find this company commencing with an aggregate capital stock of $7,700, and after continuing business about two years and five months this aggregate capital stock has increased to $10,184.05, and then, upon closing up of the affairs of the copartnership, collecting debts, disposing of property, and paying debts, there remains of the assets in all only $3,636.19. Deducting total assets from total investments, it shows a loss of $6,547.86. * * *

The next question that arises is in relation to the distribution of the assets. What proportion is each to have? Why, clearly, by the eleventh article, these assets are to be divided among the partners in proportion to the share which each has in the capital stock, after paying the debts of the firm. The plaintiff, relying upon this article, claims that Raymond is entitled to share the property in the defendants' hands with them, in the same proportion that his stock bears to theirs, which would give him something over one-third as much of these assets as the defendants receive, and that Came is to share in the same according to the amount of his stock. This would have been so under this article, had the fifth article been omitted altogether, or had the provision of that article been that the profit or loss should have been shared, not equally, but in proportion to the capital stock of each at the close of the copartnership.

But the fifth article provides that the losses and profits shall be shared equally, one-third by each member of the new firm; and before it can be ascertained what the assets are that are to be divided, the profits are first to be divided equally, and the balance will be the assets to be divided, according to the amount of capital stock, or, if there have been losses, they must first be borne equally by the several members, one-third by each, and the balance, after sharing the losses in that way, is to be divided by article 11.

Thus, although Putnam & Chase had at first three times the amount of stock that Raymond had, and four times the amount that Came & Palmer had, yet they were to receive interest on all above $1,200, and were only to have an equal share of the profits with each of the others, and were only to bear an equal proportion of the loss. Now, we have seen that the whole loss during the continuance of the company was $6,547.86. Dividing this by three, it gives the loss to each, $2,182.62; so that each is to first share his proportion of the loss before the dividend of assets can be made. Properly, if a profit had been made, this would first be divided equally, which would leave just the capital stock to be divided, or, if a loss is made, each should

first pay his proportion of the loss, and, if this were done, then the stock would remain, for each one to take just what he put in.

Suppose in this case the company had gained $6,000, instead of losing that amount: then each would have been entitled to an equal third of the profits, $2,000, and this would have been first divided, and that would have left just the same amount of capital stock for each to take out that he had put in. But now the tables are turned, and if each partner were to pay in his amount of the loss, $2,000, and more, that would make the amount of stock good, so that each could receive just what he had invested in stock. It will be seen at a glance that, if each partner paid in his proportion of the loss, that would make the whole loss, which, with the assets on hand, would equal the whole amount of capital stock invested; and then, each having shared his proportion of the loss, according to the fifth article, the assets could be divided according to the eleventh article, and each would have just the amount he put in. But if, instead of paying in each his proportion of the loss, and then receiving his share of the investment, we offset the amount of loss to the share he is to receive as capital stock, the result will be the same.

Putnam & Chase have invested in all $6,482.80. Deduct their proportion of the loss, $2,182.62, and it leaves for them to come from the assets $4,300.18. But they have received in all only $3,551.47, leaving still due to them, above all they have received, $748.71.

Raymond had invested in all $2,565.34. Deduct his proportion of loss, $2,182.62, and it leaves for him to come from the assets $382.72. But he has already received from the assets $281.52, which leaves due to him only $101.20.

Came's share of the loss is $2.182.62, while he has invested in all only $1,435.91. Deducting his whole investment from his share of the loss, and it leaves him in debt to the company, $746.71. Came has also received of assets, since dissolution, $103.20. This added to the other indebtedness, he owes the company $849.91.

Now, if Came should pay in this amount, which he is bound to do by the fifth article, in order to bear his equal proportion of the loss, it would just meet the amounts due to Putnam & Chase and to Raymond. $748.71+$101.20=$849.91. Thus we see that Came, or Came & Palmer, owe the company just enough to pay the amounts due to Putnam & Chase and to Raymond, and leave each thus to share an equal proportion of the loss, and then to divide the assets according to the amounts invested by each.

The present bill must necessarily be dismissed in its present form: First, for want of proper parties. All who are to be directly affected by the decree must be made parties to the bill. Obed Chase should be joined as one of the Putnam & Chase. Came should also be joined, or Came & Palmer; and, as it is not certain how that share does stand, the only safe way will be to make both Came and Came & Palmer parties to the bill. And, second, because Raymond has evi-

dently no claim upon the defendants. But, leaving Came out of the question, the defendants have a claim against the plaintiff for something, because, if nothing can be got of Came, then the loss by him is to be borne equally by the other two, probably; so that the defendants would have a right to call on the plaintiff to pay them such a sum as would equalize their losses by Came. But if Came is made a party, and is responsible, then, when he pays in what he owes, the plaintiff can recover his balance of $101.20, while the defendants would be getting the balance of $748.71 which remains due to them. Even if the loss by Came were to be borne by the other two partners, not equally, but in proportion to the sum invested by each, then it will be seen that there would be a balance due from the plaintiff to the defendants, provided they must lose the amount due from Came.

Assuming that the written articles of agreement do not include and regulate such losses as this, still, how should the partners who are associated together, and are to share the profits and losses equally, adjust a loss by the failure of one of their own number to pay or share his proportion of the general loss, otherwise than by sharing such loss equally between them? Raymond was as much the surety of Came to the company as Putnam & Chase were; and, if this is a joint debt to the other members of the firm, then in case of loss they would all share the loss equally. But we do not need to decide this question here, as in any event this plaintiff can recover nothing of these defendants. If not amended, the bill must be dismissed, with costs; and, if amended, the defendants will be entitled to their costs to this time.

In this way it will be observed that the same result is reached that the defendants contend for in their answer, though in a different way; not by contradicting the written articles of agreement, but by applying and enforcing them.

Let us illustrate the principle involved in this case by a simple example, which we will suppose: Three partners go into company. A. puts in $2,000, and B. and C. $1,000 each. A. is to draw interest on $1,000 of his capital, and they are to divide the profits and share the losses equally; and at the close each is to share in the assets in proportion to the amount of his investment or share of the capital stock. Suppose at the end of two years they close up, and find they have made a profit of $3,000. They divide the profit equally, and take $1,000 each. This leaves the capital stock so that each has what he invested.

But suppose, at the end of two years, on closing up, they have lost $3,000. This is to be borne equally. The share of each to lose is $1,000. Now, it will be seen at a glance that it makes no difference whether each pays in his share of the loss in cash, and then divides the assets in proportion to the amounts invested, or offsets the loss against his capital stock before he receives his share of the assets. They have lost $3,000 out of $4,000 of capital, which leaves the as-

sets only $1,000. The result will be precisely the same if A. takes the whole of the $1,000 that is left, and the others take nothing, that it would be for each to pay in $1,000 (his share of the loss) and then to divide, and A. take $2,000 and B. and C. $1,000 each. The share of loss for B. and C. is just equal to the capital stock, and A.'s loss is just half his capital stock.

But suppose the loss to be $6,000, which would be $2,000 more than all the capital stock; then, as between themselves, B. and C. must pay each $1,000 more, beside losing all their capital stock, while A. loses nothing but his capital stock, because his stock is double theirs, and his share of the loss is only the same as theirs. In all these cases we are considering the liability of the partners as among themselves, and not as to third persons.

But again: Suppose A. has $2,200 of the stock, B. $1,100, and C. $700, making $4,000 capital, as before, with the same conditions as before, and at closing they find a loss of $3,000. If each pays in his share of the loss ($1,000), that restores the capital stock, so that each can have just what he invested. But if, instead of paying in the loss, they offset that against their investment, then A. would be entitled to receive of the assets $1,200, that being his share of capital above his share of loss; B. would be entitled to receive $100, that being the amount of his stock above his share of the loss; C. would owe $300, that being the amount that his capital stock falls short of making his proportion of the loss. Now, if C. pays his $300, and thereby shares his proportion of the loss, then A. and B. can get what belongs to them; the $1,000 of assets and the $300 paid by C. making $1,300, which will give A. his $1,200 and B. his $100. But suppose A. has the $1,000—all the assets except the $300 due from C.—in his hands, and C. becomes bankrupt and fails to pay his $300; how does the case stand between A. and B.? A. has got all the assets. B. has got nothing. B. calls on A. to divide with him in proportion to their capital stock. But the company still owes A. $200, and it owes B. but $100. If this loss by C. is to be borne by A. and B. in proportion to their several amounts of capital stock, then neither could claim anything of the other, because, although B. has received nothing, while A. has received $1,000, yet the amounts they have lost over and above their $1,000 each is now just in proportion to their capital stock, namely, two to A. to one to B. But if this loss by C. is to be borne equally between A. and B., then A. could rightfully call on B. for $50, in order to equalize their loss by C., after having shared equally in the general loss by the company. That would be very much like the case before us, though here the defendants would have some claim upon the plaintiff in any event, if Came should not pay in the amount he owes the company; but, if he does pay, then all parties will get their dues.

The bill to be dismissed, unless amended.

LAMB v. ROWAN.

(Supreme Court of Mississippi, 1903. 81 Miss. 45, 35 South. 427.)

JOHNSTON, Special Judge. This case is here on Lamb's appeal and Rowan's cross-appeal from the final decree of the chancery court of Copiah county settling a partnership accounting between Lamb & Rowan and providing for the sale of the partnership property. On April 3, 1889, E. A. Rowan began the suit in the chancery court of Copiah county for a partnership accounting and for the sale of the property belonging to the firm of Lamb & Rowan. It is stated in the bill that Rowan and Lamb formed a partnership in October, 1883, for the purpose of carrying on a sawmill business in Copiah county near the town of Beauregard, on the Illinois Central Railroad, and that they afterwards built another sawmill and a planing mill near Wesson. The business was discontinued in the year 1894, though there was no formal dissolution of the partnership. It is averred in the bill that large profits were made in the business, which was conducted directly and indirectly by Lamb, and that on accounting Lamb would owe the firm not less than $20,000, and that the firm would be largely indebted to Rowan. Lamb denied in his answer that there was any partnership between himself and Rowan. Pending this proceeding the partnership property was placed in the hands of a receiver. * * *

It is insisted for Rowan in a suggestion of error that interest should be allowed to Rowan on the decree in his favor against Lamb rendered by the chancery court and corrected by this court on a former suggestion of error submitted by the appellant. The general rule, sustained by all of the authorities that have been cited by counsel and by many others which we have consulted, is that ordinarily interest is not allowed on a partnership accounting. To this there are some exceptions, where, in the discretion of the court, interest may be allowed. * * * We are of the opinion that no interest should be allowed at any time during the period of this accounting. There is no point during this whole period that can be fixed equitably as the time when interest should be charged. The accounting in the chancery court shifted from one set of balances to another. The first report of the master was set aside by the chancellor. The second report of the master was materially modified by the chancellor on both sides of the accounts. And, finally, the balances found by the chancellor in the decree appealed from have been changed by this court, and different balances directed to be struck, which has not yet been done. During this whole period of time the accounting has been in progress. The accounts in the case show that the total sales of lumber amounted to over $180,000 during the existence of the partnership. And the accounts of each partner with the firm were in many instances com-

plicated and obscure, and so many items were controverted it was impossible to state the accounts with exactness.

We will notice other leading authorities on this subject. Judge Story said that interest is not allowable in partnership accountings until a balance has been struck on a settlement between the partners. Dexter v. Arnold, 3 Mason (U. S.) 284, Fed. Cas. No. 3,855. Vice Chancellor Sandford of New York, in Beacham's Assignees v. Eckford's Ex'rs, 2 Sandf. Ch. 116, after a review of all the authorities, came to the conclusion that there is no general rule established, but that the allowance or refusal of interest depends upon the circumstances of each particular case. Judge Sharswood, in Gyger's Appeal, 62 Pa. 79, 1 Am. Rep. 382, approved this rule, saying: "This seems much the safest principle to adopt in view of the confidential relation of the parties and the variety and complication of such accounts." Lindley says that the general rule is that interest is not allowed in partnership accountings. Lindley on Partn. (4th Ed.) 786. It is said in various cases that there is no fixed rule on the subject as to what circumstances may call for the allowance of interest. And it may be said that Judge Sharswood stated the rule correctly to be that each depends upon its own peculiar facts and circumstances. This was held in Buckingham v. Ludlum, 29 N. J. Eq. 350; Johnson v. Hartshorne, 52 N. Y. 173; Gyger's Appeal, 62 Pa. 73, 1 Am. Rep. 382. The following cases also hold this doctrine: Moss v. McCall, 75 Ill. 190; Tirrell v. Jones, 39 Cal. 655; Whitcomb v. Converse, 119 Mass. 38, 20 Am. Rep. 311; Tutt v. Land, 50 Ga. 339. It has also been held that a partner is not entitled to interest on money advanced to or deposited with the firm for its use, unless there be a special agreement to that effect. Lee v. Lashbrooke, 8 Dana (Ky.) 214; Day v. Lockwood, 24 Conn. 185; Desha v. Smith, 20 Ala. 747. We announce as our conclusion on this subject that the general doctrine is well settled that interest in an accounting between partners is not allowed. The exception is that a court of equity may allow interest where, in view of the particular facts of a case, it is just and equitable to make the allowance. All of the cases that we have examined hold in the broadest terms that in the exceptional cases the allowance or disallowance of interest in an accounting between partners is within the discretion of the court. Exercising this discretion according to our views and convictions of the circumstances of this particular case, we adhere to our former ruling on this question. * * *

CHAPTER VIII.

RIGHTS AND REMEDIES OF CREDITORS.

SECTION 1.—AT LAW.

I. Creditors of the Partnership.

MEECH et al. v. ALLEN.

(Court of Appeals of New York, 1858. 17 N. Y. 300, 72 Am. Dec. 465.)

Appeal from the Supreme Court. The complaint averred these facts: In May, 1847, the plaintiffs recovered a judgment against one Taylor, upon his sole and individual indebtedness, for $8,650.65, which was duly docketed and became a lien upon his real estate. In 1848 Taylor died, seised of real estate in his own individual right, upon which said judgment was a lien. Taylor and one Hiram Pratt, who died in May, 1840, were in their lifetime partners in the business of common carriers upon the Erie Canal and the Great Lakes. A demand arose against them as such partners, which was in litigation when Pratt died, and upon which a judgment was recovered in the Supreme Court, and duly docketed on the 13th of May, 1842, against Taylor, as survivor of himself and Pratt, for $9,990.05, which judgment was assigned to and became the property of the defendant Allen after the death of Taylor and the recovery of the plaintiffs' judgment. In April, 1850, executions were issued upon both of the above-described judgments to the sheriff of Erie, who in virtue thereof, on the 4th of June, 1850, sold certain parcels of the real estate in the city of Buffalo, whereof Taylor died seised in his own right.

The plaintiffs attended at the sale, and gave notice to the defendant of the facts stated, claiming that their judgment was entitled to priority and that the money raised by the sale should be applied first to its satisfaction. The defendant became the purchaser at the sale. There is no other individual property of Taylor out of which the plaintiffs can obtain satisfaction of their judgment except the land thus sold, and there is sufficient estate of Hiram Pratt, deceased, to satisfy the judgment of the defendant.

The complaint prayed that the land might be resold and the proceeds first applied to the payment of the plaintiffs' judgment, or that the defendant pay to them so much of the proceeds of the sale already had as would extinguish their judgment, with the costs of this

action. The defendant demurred, and had judgment in his favor, which was, on appeal, affirmed by the Supreme Court at General Term in the Eighth District, whereupon the plaintiffs appeal to this court.

SELDEN, J. It is a settled rule of equity that, as between the joint and separate creditors of partners, the partnership property is to be first applied to the payment of the partnership debts and the separate property of the individual partners to the payment of their separate debts, and that neither class of creditors can claim anything from the fund which belongs primarily to the opposite class until all the claims of the latter are satisfied. This, however, is a rule which prevails in courts of equity in the distribution of equitable assets only. Those courts have never assumed to exercise the power of setting aside or in any way interfering with an absolute right of priority obtained at law. In regard to all such cases the rule is equitas sequitur legem. 1 Story, Eq. Jur. § 553.

In Wilder v. Keeler, 3 Paige, 171, 23 Am. Dec. 781, Chancellor Walworth says: "Equitable rules are adopted by this court in the administration of legal assets, except so far as the law has given an absolute preference to one class of creditors over another." So, in the case of Averill v. Loucks, 6 Barb. 470, Paige, P. J., says: "Courts of equity, in the administration of assets, follow the rules of law in regard to legal assets, and recognize and enforce all antecedent liens, claims, and charges existing upon the property, according to their priorities." This is also conceded in the case of McCulloh v. Dashiell, 1 Har. & G. (Md.) 96, 18 Am. Dec. 271, where the whole doctrine of the distribution in equity of the joint and separate property of partners is very elaborately examined. Archer, J., by whom the opinion of the court was delivered, there says: "At law the joint creditors may pursue both the joint and separate estate, to the extent of each, for the satisfaction of their joint demands, which are at law considered joint and several, without the possibility of the interposition of any restraining power of a court of equity." But especially must it be beyond the power of such courts to interfere where an absolute right of legal priority is given by force of a positive statute, as in case of a judgment. Chancellor Walworth, in Mower v. Kip, 6 Paige, 88, 29 Am. Dec. 748, says: "The rule of this court is to give effect to the lien of a judgment upon a legal title, so far as it can be enforced by execution at law."

As there is no doubt that at law the judgment for a partnership debt attaches and becomes a lien upon the real estate of each of the partners, with the same effect as if such judgment were for the separate debt of such partner, it is obvious, from the preceding authorities, that the theory upon which the complaint in this case was drawn is erroneous. The principle that the separate property of an individual partner is to be first applied to the payment of his separate debts has, as we have seen, never been held to give priority as to such property to a subsequent judgment for an individual over a prior judg-

ment for a partnership debt. It is true that courts of equity will sometimes give to a mere equitable lien, which is prior in point of time, a preference over a subsequent judgment; but this will be done only where such prior lien is specific in its character, as in the case of White v. Carpenter, 2 Paige, 219. The mere general equity of the separate creditors to have their debts first paid out of the individual property of the partners does not amount to a lien at all, much less a lien of the kind necessary to give it a preference over a judgment for a partnership debt.

The plaintiffs cannot, under the averments in the complaint, avail themselves of that principle of equity which enables a creditor having a lien upon one fund only to compel a creditor who has a lien, not merely on the same fund, but also upon another, to resort first to the latter, to the end that both may be paid. If the complaint had averred that there was sufficient partnership property, upon which the defendant's judgment was a lien, to satisfy such judgment, it is possible that, under the principle referred to, the plaintiffs might have been entitled to some relief; and in that event it would not have been a valid objection to the complaint that it did not ask for relief appropriate to the case. But the averment in the complaint is simply that there is sufficient estate of the deceased partner, Hiram Pratt, to satisfy the defendant's judgment.

This averment brings the case directly within the doctrine laid down by Lord Eldon in Ex parte Kendall, 17 Ves. 520. He says: "If A. has a right to go upon two funds, and B. upon one, having both the same debtor, A. shall take payment from that fund to which he can resort exclusively, that by these means of distribution both may be paid. That takes place where both are creditors of the same person and have demands against funds the property of the same person. But it was never said that if I have a demand against A. and B., a creditor of B. shall compel me to go against A., without more, as if B. himself could insist that A. ought to pay in the first instance, as in the ordinary case of drawer and acceptor, or principal and surety, to the intent that all obligations arising out of these complicated relations may be satisfied. But if I have a demand against both, the creditors of B. have no right to compel me to seek payment from A., if not founded in some equity giving B. the right, for his own sake, to compel me to seek payment from A.

The point has also been expressly decided in this state in the case of Dorr v. Shaw, 4 Johns. Ch. 17. The only difference in principle between that case and this is that there it did not appear that the joint debtors were partners. This, however, is a difference which operates against the claim of the plaintiffs here. Where two individuals, not partners, are jointly indebted, it might seem to be just to presume that each owed one-half, and to that extent, therefore, there might be an equity in favor of the one owing an individual debt to have so much of the joint debt paid by his co-debtor. But in regard to part-

ners it is now well settled, upon an analogous question, that no such presumption can be indulged. Formerly a judgment creditor of one of two partners might levy his execution upon property belonging to the firm, and, upon the presumption that the interests of the partners were equal, might proceed to sell and appropriate one-half the avails to the satisfaction of his debt. This, however, was long since overruled.

In the case of Dutton v. Morrison, Lord Eldon, in discussing this question says: "It may be represented that the world cannot know what is the distinct interest of each (i. e., each partner), and therefore it is better that the apparent interest of each should be considered as his actual interest. But courts of equity have long held otherwise." He then lays down the rule, ever since acted upon, that the creditor in such a case must wait until the partnership accounts are settled before he can claim anything from the partnership property.

The principle here asserted by Lord Eldon is directly applicable to the present case. It is that no inference can be safely drawn, from the mere external relations of partners to the world, as to the situation of their affairs inter se, and that, in all judicial proceedings involving the latter, an investigation is first to be made; and such is the variety and frequent complexity of partnership dealings that any other rule would obviously lead to gross injustice. It is impossible, therefore, in this case to assume, without any averments on the subject in the complaint, that the estate of the deceased partner, Pratt, ought, in equity, to pay any portion of the defendant's judgment. Hence, upon the principles laid down by Lord Eldon, and universally acted upon by courts of equity, the complaint is clearly insufficient.

The judgment of the Supreme Court, therefore, should be affirmed, with costs.

Judgment affirmed.[1]

[1] In Stevens v. Perry, 113 Mass. 380 (1873), in holding that a firm creditor may, by trustee or garnishment proceedings, reach the goods or effects of a partner in the hands of a third person, the court said: "It is well settled as matter of law in this commonwealth that, in a suit against two or more copartners upon their joint debt, the separate property of any one of the partners may be attached, and the lien so acquired is not discharged or impaired by a subsequent attachment of the same property upon a suit in favor of a separate creditor of the same partner. Allen v. Wells, 22 Pick. (Mass.) 450, 33 Am. Dec. 757; Newman v. Bagley, 16 Pick. (Mass.) 570. The Supreme Court of New Hampshire has in several cases held otherwise. Jarvis v. Brooks, 23 N. H. 136; Bowker v. Smith, 48 N. H. 111, 2 Am. Rep. 189. But we must consider ourselves bound by our own decisions. As the debt due from the partners jointly is also due from each, it may be enforced against the separate property of each. It is immaterial whether this separate property is in the form of goods and movable chattels, or goods, effects, and credits intrusted and deposited in such a manner that they can only be attached upon a trustee process. It is not necessary that the principal debtors should have made a joint deposit, or that the fund should belong to them jointly. It is enough if funds attachable upon a trustee process are due from the alleged trustee to either one of the principal defendants."

JAFFRAY et al. v. JENNINGS et al.

(Supreme Court of Michigan, 1894. 101 Mich. 515, 60 N. W. 52, 25 L. R. A. 645.)

Hooker, J. Plaintiffs were copartners, residing in New York, and were jobbers, of whom the defendants (father and son, and also partners) purchased goods. The son, Ward L. Jennings, having purchased a quantity of goods for his firm from the plaintiffs, the latter commenced proceedings by attachment upon an affidavit which alleged that the defendants fraudulently contracted the debt upon which the action was brought, viz., that arising from the purchase mentioned. The writ was levied upon property belonging to the father, and upon his application the attachment was dissolved by the circuit judge. It was admitted that at the time of the levy the firm had sufficient personal property out of which the claim could have been satisfied. Defendants' contention is that the individual property of the innocent defendant was not subject to seizure by attachment. Counsel for the plaintiffs build a strong argument upon the doctrine that each partner is an agent of his fellows, citing May v. Newman, 95 Mich. 501, 55 N. W. 364, to the proposition that an attachment lies against a debtor whose agent fraudulently contracted the debt. But the statute upon which the remedy by attachment depends has relieved the innocent partner from the application of this rule. An examination of the statutes may aid in solving this question. We start with the proposition that "attachment is a harsh and extraordinary remedy, unknown to the common law; and the statutory provisions upon which the right depends, being in derogation of the common law, must be strictly construed, and cannot be extended beyond their terms." See cases cited in 1 Jac. & C. Dig. p. 96, § 1; Estlow v. Hanna, 75 Mich. 219, 42 N. W. 812. An action against joint debtors is like any other action. It is aimed at the individual debtors. A service on one is not a service upon the other; they may appear separately; their defenses may be different; the judgment is against each for the whole amount; the execution issues against the individuals, the officer being commanded to collect the debt from the goods and chattels, and, for want thereof, of the lands and tenements, of the individuals. And this is as true where the joint obligation is a partnership debt as in cases where the debtors are not copartners. The act authorizing proceedings in attachment permits any creditor to have an attachment against his debtor, upon conditions mentioned. The conditions are that he shall show that the defendant—i. e., the debtor—is believed to be guilty of certain acts, or to possess certain intentions regarding the debt or his property, fraudulent in character, the general tenor of which indicates danger that such debtor will put his property beyond the reach of the creditor. The law lays hold of the property of such debtor, to preserve it for the creditor. So long as there is a sole

debtor, no difficulty is likely to arise, but when the debt is joint the question arises, how far should the fraudulent acts and intentions of one subject the property of another to seizure? The acts, if strictly construed, only provide for attachment against the debtor who is guilty of the fraud. An additional remedy, summary in its nature, is given against him. It is given, in terms, against no others. And where the act is done by one only, the law can only be made applicable to another by invoking the doctrine of agency.

No one will question the fact that one can, through an agent, subject his property to attachment; and this is as true where the agent is a partner as where he is not, and where the act complained of is the fraudulent purchase of goods by a partner, as in this case. There is much persuasiveness in the argument that, as the firm received the benefit and appropriated the fruit of the transaction (whether with knowledge upon the part of both or not), the rule that a partner is an agent of his copartners makes his act the act of both. It would not be so convincing if the cause for attachment were another of those named in the statute—e. g., if one only was shown to have an intent to dispose of the firm property, or had actually done so without the knowledge of his partner, or where he absconded, or removed out of the state, or was about to do so, with intent to defraud the firm creditors. Still more hard would be the attachment against one where his copartner had merely resided out of the state for three months, which in itself is ground for attachment, regardless of the honesty of his intention. Can it be said that in all of these cases these acts are partnership acts, binding the partners under this application of the doctrine of agency? Is it true that the creditors of a firm in Michigan, one of the members of which lives in Chicago, have the absolute right to commence all actions against the firm by attachment, and to levy not only on the firm property, but that of each resident member, as well as that of the nonresident? If not, it must be that this doctrine is improperly applied, or a distinction must be drawn between the different causes for attachment named in the statute, and the liability limited to those acts which, we may say, either as a conclusion of fact or law, are the acts of the firm, which would seem to limit the cases to those where the debt was fraudulently contracted, and where the property of the firm had been assigned, concealed, or disposed of with intent on the part of one to defraud the firm creditors. If plaintiffs' theory is correct, these would be the acts of all partners, and subject to seizure not only the partnership property, but the individual property of each partner, no matter how honest, and notwithstanding their solvency. There can be no doubt that partners are bound by the contracts, and many times by the torts, of one of their number, to the extent of liability. But is it as clear that the nature of the remedy is always subject to the same rule? As already stated, this remedy is statutory, and the statutes must show the design to cover such cases as this, or they are not to be treated as within them.

The attachment statute is borrowed from New York. It will be found in the Revised Statutes of 1838 and 1846 and the Compiled Laws of 1857. The section of which Howell (section 8015) is an amendment remained unchanged from the time of its adoption until 1861. It is section 19, c. 1, tit. 4, pt. 3, p. 512, Rev. St. 1838. The same is found in Rev. St. 1846, § 30, p. 517, and Comp. Laws 1857, § 4771. It reads as follows, viz.: "When two or more persons are jointly indebted as joint obligors, partners, or otherwise, the attachment may be issued against the separate or joint estates or property of such joint debtors or any of them, and the same proceedings shall be had as hereinbefore prescribed." It goes without saying that under this act, where all of the joint debtors are shown to have participated in the statutory act, or where it appears that each has entertained the fraudulent intent, the writ should issue against all; and it is as plain that in such case the writ could be issued against the separate or joint estates of the debtors. So far it lays down a plain, consistent, and just rule. Shall we go further, and say that it was meant that the writ would be as far-reaching in cases of joint debtors, who are not partners, where one was innocent of wrong? That would probably not be claimed by any one. As to partners, the same claim might be made as is made here, viz., that in dealing with the partnership property the act of one is the act of all, and that the consequences are the same to all. But this act had received a construction before it became a law in Michigan. In the case of Cyrus Chipman, an absconding debtor (14 Johns. [N. Y.] 217), decided in 1817, it was held that the attachment might issue against the property of one of several partners who absconds, for a debt due by the firm, although his copartners are resident within the state, and subject to process. This is not conclusive of the question here, and is cited only to show that counsel in that case did not resort to the remedy by attachment against all of the partners. Two years later the same court held that an attachment might issue against the separate property of an absconding debtor upon a debt due from his copartnership. Here, again, the writ appears not to have been sought against the partners who remained. But the case went further, and held that the partnership property could not be seized; and the reason was that the other partner had a right to retain it to pay the partnership debts. Ex parte Smith, 16 Johns. (N. Y.) 102. It may still be said that in neither of these cases were all of the partners sued in attachment, and therefore there yet remains doubt if the right contended for does not exist under this statute, and it is probable that such doubts led to the amendment of 1861, which reads as follows: "When two or more persons are jointly indebted as joint obligors, partners, or otherwise, and an affidavit shall be made, as provided in section two of this chapter, so as to bring one or more of such joint debtors within its provisions, and amenable to the process of attachment, then the writ of attachment shall issue against the property and effects of such as are so brought within the

provisions of said section; and the officers shall be also directed in said writ to summon all such joint debtors as may be named in the affidavit attached thereto, to answer to the said action as in other cases of attachment." Before discussing the statute, let us review the situation. Under the previous statute, attachment lay against all joint debtors, whether partners or not, where it could be shown as matter of fact that all participated in the act constituting a cause. It was also plain that, where one joint debtor only committed such act, his property only was subject to the writ, unless there was a partnership. There was, then, no necessity for legislation to reach either of these cases, for joint debtors, where not partners, were fully protected where innocent of wrong, and the creditors had his remedy against both where both participated, and against the offender where only one was guilty. In this condition of affairs, the Legislature passed section 8015, thereby giving immunity from attachment to joint debtors, including partners, who were not themselves participants in the wrongful act. Now, by a construction of this act, it is sought to say that partners are not within its terms, because the act of one is the act of all, and that, as a matter of law, they are, therefore, all participants in the fraudulent act. If that is so, the statute seems to have no office to perform. It has relieved nobody. Joint debtors, not partners, could not be attacked by attachment before unless guilty. But there may have been a doubt about partners. That doubt seems to have caused the enactment of a law whose only object must have been to reach and relieve the very class of cases which the construction contended for seeks to exclude from its protection.

As said at the outset, attachment is a harsh and extraordinary remedy. The law may well restrict its use, and deny it as against all honest persons, though they have the misfortune to be connected in business as partners with dishonest persons. Such persons have legal obligations to discharge in relation to the partnership affairs. They must see that obligations are discharged, and the law presumes that they will faithfully do so. No very good reason suggests itself why the private fortune of an honest partner should be seized because his partner has been detected in a fraudulent act in connection with partnership affairs. It is common knowledge that few men or firms can survive an attack by attachment. It is the almost certain precursor of insolvency, as in former days it was of bankruptcy, and we should hesitate before broadening the scope of the act in question. A case quite similar to the present was before the court, viz., Edwards v. Hughes, 20 Mich. 290. Mr. Justice Cooley wrote the opinion, and seems to have taken a similar view of these statutes to that expressed above. It is true that the facts in that case may permit it to be distinguished from the present, but the language used is broad, and it is hardly possible that the court could have overlooked the contingency of such cases as this. Since this decision we think the bar have understood that the liability was limited to such partners as person-

ally participated in the fraudulent act. See Tiffany's Justice Guide, p. 60, note 1, where this doctrine is laid down; Shinn, Pl. & Pr. § 307. See, also, People v. Circuit Judge, 41 Mich. 326, 2 N. W. 26, where a writ issued against nonresident partners only. We think the learned circuit judge correct in his conclusions, and that his order dissolving the attachment should be affirmed, with costs.[1]

II. Creditors of the Partners.

HEYDON v. HEYDON.

(Court of King's Bench, 1693. 1 Salk. 392.)

Coleman and Heydon were copartners, and a judgment was against Coleman, and all the goods of both Coleman and Heydon were taken in execution. And it was held by Holt, C. J., and the court, that the sheriff must seize all, because the moieties are undivided; for if he seize but a moiety, and sell that, the other will have a right to a moiety of that moiety; but he must seize the whole, and sell a moiety thereof undivided, and the vendee will be a tenant in common with the other partner.

TAYLOR v. FIELDS.

See ante, p. 210, for a report of the case.

PARKER v. PISTOR.

(Court of Common Pleas, 1802. 3 Bos. & P. 288.)

This was a rule calling on the plaintiff to show cause why the sheriffs of London should not have time to return a writ of fieri facias to the first day of next term.

The defendant was one of two partners, and the application was made on the part of several creditors of the partnership, and the ob-

[1] The dissenting opinion of Montgomery, J., in which McGrath, C. J., concurred, is omitted.

Whether, in a suit against the firm, the property of the partnership can be attached because of the misconduct of one partner, will depend upon whether his act was within or without the scope of the partnership business. In Staats v. Bristow, 73 N. Y. 264, the nonresidence of one partner, and in Evans v. Virgin, 69 Wis. 153, 33 N. W. 569, the fraudulent transfer by one partner of his separate property, was held not to justify an attachment of the firm property, but only the misconducting partner's interest in such property. But in Winner v. Kuehn, 97 Wis. 394, 72 N. W. 227, where the misconducting partner was the general manager, his misconduct was held sufficient to justify an attachment.

ject was to prevent the partnership goods from being sold until an account could be taken of the several claims upon this property.

Best, Serjt., who obtained the rule, observed that the sheriff was only entitled to take possession of an undivided, not of a separate, moiety of the partnership goods; that he could only hold that moiety in the same manner as the defendant himself had done; and that, as the defendant was not entitled to sell the partnership goods without the consent of his partner, the sheriff ought not to be obliged to do so by a writ of venditioni exponas. He mentioned a case in the Court of King's Bench, where a similar application had been made, which stood over several times, and the rule was at last made absolute by consent; the plaintiff having been driven to give that consent in consequence of Lord Kenyon saying that the court would enlarge the rule from time to time until the parties did consent. He also referred to Eddie v. Davison, Doug. 650, and Taylor v. Field, 4 Ves. Jr. 396, where it was holden that the joint property of an insolvent partnership, taken in execution for a separate debt, could not be retained against the joint creditors.

Lens, Serjt., contra, insisted that this was merely the common case of partnership goods taken in execution; that, if the defendant had any interest whatever, the sheriff was bound to take the partnership goods and sell them; if not, he ought to return nulla bona. He observed that in Taylor v. Field it was admitted that the above rule would prevail at law, and in Pope v. Haman, Comb. 217, this distinction is pointed at; Holt, C. J., saying: "Upon a judgment against one copartner the sheriff may take the goods of both in execution, and the other copartner hath no remedy at law otherwise than by retaking the goods if he can; for the vendee of the sheriff becomes tenant in common with the other copartners."

THE COURT were of opinion that there was no ground for their interposition; that it was a very plain case at law, and that all the difficulties were to be encountered in equity; that the safest line of conduct for the sheriff to pursue was to put some person in possession of the defendant's share as vendee, leaving him and the parties interested to contest the matter in equity, where a bill might be filed, stating that he had taken possession of the property, and praying that it might not be disposed of, until all the claims were arranged. Vide Chapman v. Koops, 3 Bos. & P. 289.

Rule discharged.

RANDALL v. JOHNSON.

(Supreme Court of Rhode Island, 1881. 13 R. I. 338.)

POTTER, J. William J. Randall and Lydia Randall, copartners by the style of William J. Randall & Co., sue Johnson, the defendant, in trespass vi et armis for breaking and entering the plaintiffs' store

and attaching certain personal property which they claim as the property of said firm. Johnson, the defendant, pleads that J. F. Comstock & Co. sued out a writ of attachment against said William J. Randall, and that he, Johnson, being a deputy sheriff, attached said property on the said writ as the property of said William, and said property was afterwards sold at public sale by order of one of the judges of this court according to the provisions of the statute, and that the said William was notified thereof as by law provided, and was himself the highest bidder for and purchaser of a portion of them. The plaintiffs demur.

The plaintiffs, William J. Randall & Co., contend that, being partnership property, it could not be attached as the property of one of the partners, and that therefore the plea, if true, alleges no valid defense.

The weight of the authority seems to be most decidedly in favor of the right of a creditor of one partner to attach that partner's right in the goods, chattels, and tangible property of the firm for his private debt due from such partner. Story on Partnership, §§ 262, 311; 3 Kent, Com. *65, and note b; Collyer on Partnership (4th Am. Ed.) p. 738, § 822, and note. In the note to the latter work, as also in Kent, the cases are well stated. The attaching creditor can only take the interest of the partner—i. e., subject to the settlement of the partnership affairs—and, although the sheriff may and must seize the chattel, he can sell only the partner's right in it as above.

The difficulties likely to arise in such attachment are stated in many of the cases. But, on the other hand, if the law were otherwise, a debtor might prevent attachment of his property for a debt due from himself by putting it into a partnership.

In the case of Phillips v. Cook, 24 Wend. (N. Y.) 389, the subject was considered by Judge Cowen, who delivered the opinion of the court, and the cases reviewed at great length. It was there held that the sheriff might seize the whole of the particular article, and sell the interest of the debtor in it, and deliver it to the purchaser, who then became a tenant in common with the other partner and took subject to a settlement of partnership accounts and to the equitable claims of the creditors of the firm; and this, we think, is in accordance with the other decisions on the subject. See, also, opinion of Nelson, C. J., in Birdseye v. Ray, 4 Hill (N. Y.) 158, 161; and as to the disposal of the purchase money and the remedy of the other partner, see Phillips v. Cook, 24 Wend. (N. Y.) 389, and Doner v. Stauffer, 1 Pen. & W. (Pa.) 198, 21 Am. Dec. 370.

Although, if the officer sells the whole, it will be as to the co-tenant a conversion (Ladd v. Hill, 4 Vt. 164; White v. Morton, 22 Vt. 15, 52 Am. Dec. 75; Bradley v. Arnold, 16 Vt. 382; Walker v. Fitts, 24 Pick. [Mass.] 191; Waddell v. Cook, 2 Hill [N. Y.] 47, 37 Am. Dec. 372; Drake on Attachment, § 248), yet it is no conversion as to said William J. Randall. Whether his interest or the whole is sold,

he cannot complain; and, if the plea be taken as true, he cannot maintain this action, and the suit in its present form must fail. Whether the other party plaintiff can maintain a suit will depend on whether she was, or not, a partner or had any interest in said property.

Demurrer overruled.

SANBORN et al. v. ROYCE.

(Supreme Judicial Court of Massachusetts, 1882. 132 Mass. 594.)

Tort, by Charles H. Sanborn and Charles H. Packard, copartners doing business under the firm name of Sanborn & Packard, for breaking and entering the plaintiffs' close in Boston, and taking and carrying away certain articles of personal property belonging to them, with a count in tort for the conversion of the same. The defendant, a constable of the city of Boston, justified under a writ against Packard, by virtue of which he attached the property in question. At the trial in the superior court, before Putnam, J., it appeared that the plaintiffs were copartners in the grocery and provision business, and the defendant was notified of this fact at the time of the attachment; that on May 3, 1879, a creditor of Packard individually sued out a writ against him and delivered it to the defendant, who by virtue of it, on May 31, 1879, attached all the property of the partnership, placed a keeper over the same, and afterwards on the same day, by order of the plaintiff's attorney, withdrew the keeper and removed the goods, and on June 3, 1879, released the attachment, and left the goods where he found them; and that the writ against Packard was duly entered in court on June 19, 1879, and is now pending. Upon these facts the defendant contended, and asked the judge to rule, that he was justified, by virtue of said writ, in what he did with reference to the property, and that the plaintiffs could not maintain their action. The judge declined so to rule, and ruled otherwise. The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions.

C. Allen, J. The question presented in this case has been several times alluded to, but has never been decided in Massachusetts, though it has been the subject of much discussion and conflicting opinion elsewhere. It has been declared that the real and actual interest of each partner in the partnership stock is the net balance which will be coming to him after payment of all the partnership debts and a just settlement of the account between himself and his partner. Peck v. Fisher, 7 Cush. 386. This doctrine is in accordance with the great body of modern decisions. It is also declared in Allen v. Wells, 22 Pick. 450, 33 Am. Dec. 757, that a separate creditor can only take and sell the interest of the debtor in the partnership property, being his share upon a division of the surplus, after discharging all demands upon the partnership. This rule, also, is supported by a great weight of authority. It is rather remarkable, in view of the multitude of

cases in which the question has arisen and the conflict of opinion which has existed, that the manner in which a creditor of one member of a firm may apply that member's interest in the partnership to the payment of his debt has not been more often the subject of legislation. The rights of parties, however, in this state, as in almost all the states of the Union, are still left to be worked out as well as possible by the courts. There is an entire concurrence of opinion among the leading text-writers, in recent times, that courts of law cannot adequately deal with the subject. 3 Kent, Com. 65, note; Story, Part. §§ 262, 312; Collyer, Part. (6th Ed.) § 793. Lindley sums up what he has to say with the remark: "The truth, however, is that the whole of this branch of the law is in a most unsatisfactory condition and requires to be put on an entirely new footing." Lindley, Part. (4th Ed.) 694.

It is sufficient for the purposes of the present case to decide, as we do, that the seizure and actual removal of specific chattels of a partnership on mesne process or execution against one member thereof for his private debt, and the exclusion of the firm from the possession of its property, are a trespass. The authorities in support of this proposition seem to us more in accordance with just legal principles than those which are opposed to it. Fourth Nat. Bank v. Railroad Co., 11 Wall. (U. S.) 624, 628, 529, 20 L. Ed. 82; Cropper v. Coburn, 2 Curt. (U. S.) 465, Fed. Cas. No. 3,416; Burnell v. Hunt, 5 Jur. 650, by Patteson, J.; Garvin v. Paul, 47 N. H. 158; Durborrow's Appeal, 84 Pa. 404; Haynes v. Knowles, 36 Mich. 407; Levy v. Cowan, 27 La. Ann. 556.

Exceptions overruled.

PLACE v. SWEETZER et al.

(Supreme Court of Ohio, 1847. 16 Ohio, 142.)

This is a bill in chancery, reserved in the county of Delaware. John W. Place, the complainant, Adam Wolf, and Abraham Wolf were partners, carrying on mercantile business in Delaware county, and, while they were so in partnership, Sweetzer, one of the defendants, having two judgments in the court of common pleas of that county against said Adam Wolf, amounting together to somewhat more than $1,400, and the defendant Cone having a judgment in the same court for about $150, took out executions by virtue of which the sheriff levied upon the stock of goods of the firm and took them into his possession. The complainant, then another of the partners, brought this bill, seeking to enjoin the judgment creditors from selling the partnership effects to satisfy the separate debt of one of the partners. There is a cross-bill also, filed by the judgment debtor, Adam Wolf, wherein he states that he transferred to Sweetzer a certain quantity of pork and lard, which was to be sold and the proceeds thereof applied toward the payment of one of the judgments; that

this pork and lard were sold, but the proceeds, through the neglect and misconduct of Sweetzer, were entirely lost, and not so applied; that Sweetzer ought to account for the amount of sales, and give a credit for it upon one of the executions. The cause comes on for hearing upon bill, cross-bill, answers, replication, and testimony. * * *

AVERY, J. The first question arising in this case is whether the original bill, with its injunction, can be sustained. This, of course, must depend upon the rights of a judgment creditor having an execution against one of the partners for his separate debt.

The goods of the firm, being personal property, and held always subject to levy under an execution at law against all the partners for a partnership debt, must be deemed to be held by the same title, and the share of each partner to be held likewise subject at law to levy under an execution against him individually. But though this property may be seized, and thus withdrawn from the debtor's control, it does not necessarily follow that it must be sold also under the execution. If the sale could not be restrained, great injustice might very often be the consequence; for in many, perhaps in most, cases neither the sheriff, nor the debtor, nor any other person, could make known at the sale what property the purchaser would take. The interest of the partner cannot be ascertained till all the partnership accounts are arranged; and it is well settled that this interest is a certain share of the surplus after all of the demands against the firm, including those of the partners individually, are paid. It is this share of the surplus only which can be sold under execution, and to secure a fair sale of it the value must be known. This can be accomplished through the aid of a court of equity alone, where all the intricate affairs of a partnership may be examined and adjusted. A resort to this court, in cases like the present, may become important to secure the rights, sometimes of judgment creditors, at other times of the debtor, and sometimes, as here, to secure the rights of other partners. We see no objection to allowing the remedy in either case. The present complainant, when the levy was made, had at once a direct interest to bring the concerns of the partnership to a close, to apply the effects of every description to the payment of debts of the firm, and to prevent a sacrifice of the judgment debtor's share, because by such a sacrifice his own share might be burdened. The complainant prays that an account be taken between the parties of the amount due by the firm, that the same be first paid out of the property of the firm, and that complainant's interest in the surplus be paid, before execution creditors be permitted to assert their claims on the property and apply it to the payment of the separate debt of Adam Wolf. This prayer of the bill will be granted, the accounts be sent to a master for examination and report, and the injunction in the meantime be continued. The cross-bill will be dismissed, as the allegations are not sufficiently supported by the proof.

PEOPLE'S BANK, Garnishee, v. SHRYOCK et al.

(Court of Appeals of Maryland, 1877. 48 Md. 427, 30 Am. Rep. 476.)

Brent, J. The appellees, having obtained a judgment against William H. Trego, issued upon it an attachment by way of execution. This attachment was laid in the hands of the People's Bank of Baltimore, to bind the interest of the defendant, Trego, in a sum of money standing upon the books of the bank to the credit of the firm of Trego & Kirkland, of which firm Trego was a partner.

The question then arises, is a debt due to a copartnership liable to attachment at the suit of a creditor of one of the partners? If the attachment had been laid upon the tangible effects of the firm, there would be no doubt of the right to do so; for all the authorities concur that the property of a firm may be sold for the debt of one of the partners. When sold, the vendee purchases and is substituted to nothing more than the interest of the partner, which afterwards becomes the subject of ascertainment by a proper adjustment of the respective interests of the partners. The rights of copartners and creditors of the firm are not thereby sacrificed or disturbed. But where a debt is the subject of attachment, the judgment, if obtained against the garnishee, changes the right to the fund without any settlement of partnership account, and vests in the attaching creditor an absolute claim to the payment over to him of so much money. In Drake on Attachment, § 567, the author says: "The attachment of a debt due to a copartnership in an action against one of the partners is justly distinguishable from the seizure on attachment or execution of tangible effects of the firm for the same purpose." He refers to the case of Winston v. Ewing, 1 Ala. 129, 34 Am. Dec. 768, and this case is a very strong one upon the question now presented for our decision. There it was sought to subject the debt due to a firm to an attachment issued against one of the partners. The court held that this could not be done. The property of the partnership, it was conceded, was liable to execution and sale for the separate debt of a partner; the vendee under such sale becoming tenant in common with the other partner. But it was otherwise held in regard to a debt due. The court says: "It has been expressly adjudged that the interest of one partner in a debt due to the partnership cannot be subjected by process of attachment to the satisfaction of the separate debt of that partner, without showing from the state of the partnership accounts, as between the partners and with reference to the indebtedness of the partnership, what the right or interest claimed amounts to." The authorities cited are Fisk v. Herrick, 6 Mass. 272, Lyndon v. Gorham, 1 Gall. (U. S.) 367, Fed. Cas. No. 8,640, Church v. Knox, 2 Conn. 514, and Brewster v. Hammet, 4 Conn. 540; and they conclusively show that an attachment like the present would not be maintained in the courts of either Massachusetts or Connecticut.

In Lyndon v. Gorham, 1 Gall. (U. S.) 367, Fed. Cas. No. 8,610, decided by Judge Story, that learned judge says: "In order to adjudge the trustee responsible in this suit, it must be decided that the funds of one partnership may be applied to the payment of the debts of another partnership upon the mere proof that the principal debtor has an interest in each firm. If this be correct, it will follow that a separate creditor of one partner will have greater equitable as well as legal rights than the partner himself has. The general rule undoubtedly is that the interest of each partner in the partnership funds is only what remains after the partnership accounts are taken; and unless, upon such an account, the partner be a creditor of the fund, he is entitled to nothing." In Johnson v. King, 6 Humph. (Tenn.) 233, it is said: "The question in this case is whether an execution creditor of one member of a partnership is entitled to a judgment in a garnishment proceeding against a debtor to such partnership. This question we decide in the negative. Such debt belongs to and is assets of the partnership, primarily liable to the satisfaction of partnership debts. If a judgment were given at law, upon the garnishment proceeding against the debtor of the partnership, to satisfy the separate liability of one of the partners, it would unjustly abstract a portion of the fund primarily belonging to the objects and purposes and creditors of the concern. And in such garnishment nothing can be done but to give or refuse the judgment. The court has no power to impound the debt, until by the adjustment of all the partnership affairs it shall appear whether the separate debtor of the execution creditor has any, and what, interest in the general surplus, or in the particular debt so impounded. Such proceedings cannot take place at law."

We have quoted at length from this case, because the views there expressed seem to be specially appropriate to the case before us. The proceeding of attachment in this state is essentially a legal proceeding, and in no way appropriate to ascertain and settle the equitable rights between the garnishee and defendant, or to ascertain, by adjusting the partnership affairs, the true interest of the defendant in the fund attached. The only judgment which could be given against the garnishee would be for a proportion of the money due the partnership, that proportion to be measured by the number of the members composing the firm and the amount due the attaching creditor. This would certainly be against the weight of authorities in this country, and in most cases productive of the greatest injustice.

In the cases of Sheedy v. Bank, Garnishee, 62 Mo. 18, 21 Am. Rep. 407, and Myers v. Smith et al., 29 Ohio St. 120, both decided in 1876, it was held that partnership demands cannot be garnished for the separate debt of one of the partners. And to the same effect are the decisions in Vermont, New Hampshire, New York, Louisiana, and Mississippi. See Drake on Attachment (4th Ed.) § 570, and notes. The exception to this rule is where equity powers have been conferred

by statute upon the common-law courts, and when by virtue of such powers they can compel a settlement of the partnership for the purpose of ascertaining whether one of the partners has such an interest in a particular debt due the firm as to justify its appropriation to the payment of his individual indebtedness. As no such powers have been conferred upon the common-law courts of this state, the exception cannot be applied to an attachment here.

The only cases in this country in which it is claimed a contrary doctrine is held, and to which we have been referred, are the cases of McCarty v. Emlen, 2 Dall. (Pa.) 277, 1 L. Ed. 380, Knox v. Schepler, 2 Hill (S. C.) 595, and Wallace v. Patterson, 2 Har. & McH. (Md.) 463.[1] * * *

So satisfied are we, upon the ground of reason and expediency, and the great weight of authority, that the partnership credits of a continuing partnership should not be subjected to the process of attachment at the suit of a separate creditor of one of the partners, that we cannot adopt the case of Wallace v. Patterson to the extent which is claimed for it.

In our opinion, then, in a case like the present, where the partnership is a continuing one, and where there has been no adjustment of partnership affairs, a debt due the partnership cannot be taken by garnishment to pay the individual debt of one of the members of the firm.

This judgment will therefore be reversed, and judgment entered for the appellant.

JOHNSON v. WINGFIELD et al.

(Court of Chancery Appeals of Tennessee, 1897. 42 S. W. 203.)

BARTON, J. This cause is before us on bill and demurrer. The demurrer was sustained, and the bill dismissed. Complainant appealed, and assigns errors. The main question presented in the case is whether in this state specific property belonging to the firm is subject to levy for the individual debt of one of the members of the firm. The case made in the bill substantially is as follows: The complainant shows and avers that he had obtained before a justice of the peace in Hamilton county two judgments against the defendant Wingfield, on which executions had been issued and certified, in pursuance of section 3786 of the Code of Tennessee, to Hamblen county, where executions had been issued, which were placed in the hands of a constable, and by him, on the 2d day of January, 1896, levied on the interest of Nisbet Wingfield in a lot of iron pipe and other material, the property of the firm of J. N. Hazelhurst & Co., a firm composed of J. N. Hazelhurst and Nisbet Wingfield, in which firm, it is alleged,

[1] Thompson v. Lewis, 34 Me. 167, contra.

Hazelhurst and Wingfield were equal partners. It is further alleged that the interest so levied on in the partnership property was advertised and sold according to law by the constable making the levy at public sale in the city of Morristown, on the 5th of January, 1896. It is further charged that J. N. Hazelhurst and Wingfield continued as partners, under the firm name of Hazelhurst & Co., until January 7, 1896, when the firm dissolved; upon what terms and conditions, complainant does not know, but it is charged that there was no partnership settlement had between the partners, and that the purpose and object of the dissolution of the partnership was to embarrass and defeat the collection of complainant's execution. It is further charged that on January 7, 1896, a new partnership was organized, under the old firm name of J. N. Hazelhurst & Co., composed of J. N. Hazelhurst and D. R. H. Plant, and that this firm was engaged in the completion of the waterworks for the city of Morristown, under the contract made for that purpose by the old company. It is charged that, after the sale was made, the statement was made by one of the attorneys of Hazelhurst, a member of both firms, who had been present and made a bid at the sale of the property, that Wingfield was no longer a member of the firm, and had no interest in any other property which belonged to the old firm of Hazelhurst & Co. It charged that the new firm, composed of Hazelhurst and Plant, had full knowledge of the complainant's levies; that the property levied on was reasonably worth in the market, at the time of the levy, $3,000; and that Wingfield's interest in the property was at the time of the sale and purchase by the complainant, who was the purchaser at the execution sale, reasonably worth $1,500; that complainant notified Hazelhurst & Co. not to move or interfere with the pipe until his interest was paid for; that Hazelhurst & Co. disregarded the notice and complainant's rights in the property, and converted the same to their use, in the construction of the waterworks, a few days after complainant had purchased Wingfield's interest in the partnership property; that complainant was damaged by the conversion fully $1,500. It is further shown that the new members of the firm of Hazelhurst & Co. were nonresidents; that they had a fund coming to them in the First National Bank of Morristown, against which an attachment was prayed and issued. The prayer of the bill is that a partnership account be had and stated between the defendant J. N. Hazelhurst and Nisbet Wingfield, so as to ascertain what interest Wingfield had in the partnership property described in the levies, and the value of that interest at the time the levies were made, at the time of the sale, and also at the time when the property was converted by J. N. Hazelhurst & Co., and for a decree against J. N. Hazelhurst & Co. and R. H. Plant, or the new firm of Hazelhurst & Co., for the amount so found, and for general relief. It is also shown in the bill that the old firm of Hazelhurst & Co. had other property at the time of the levies besides that levied on, it appearing that certain property was levied on belonging

to the firm, and that was released, and levy made on other property. The proceedings before the justice of the peace, the executions, and the return of the officer, are made exhibits to the bill. The officer's return, in substance, is that he levied on all the right, title, and interest which Nisbet Wingfield, as member of the firm of J. N. Hazelhurst & Co., had in the following personal property, situated and being in Morristown, Tenn., on the Southern Railway's side track, to wit, 25 iron fire plugs, etc., described in the paper. Both executions also show due sale of the property after advertising, the property in each instance being bid in by the complainant, Johnson, for $15. The defendants filed a demurrer and answer, the demurrer being incorporated in the answer; the substance and point of demurrer being that a levy cannot be made on a certain, specific part of partnership property for the individual debt of one of the members of the firm, as the bill shows was done in this case, and that, to reach a partner's interest in partnership property, the levy must be made upon all the partnership property. The point is made that the partnership owned as an entirety the particular assets of the partnership, and had a right to use the same in the business of the partnership; that the purchaser would be required simply to take the interest of the debtor partner, and would have no right to maintain this bill for trover or conversion of the specific property levied on. The answer filed denies that the interest of Wingfield at the time of the levy amounted to anything, and asserts there was an excess of liabilities at that time over assets. As stated, the demurrer was sustained, and the bill was dismissed. * * *

The main question presented has been before our Supreme Court in a number of cases, and the subject seems to be surrounded by many perplexities. One of the earlier and the leading case in this state on the subject is that of Haskins v. Everett, 4 Sneed, 531. This was an action of replevin brought by Haskins & Reynolds against James Everett, to recover certain personal property belonging to the firm of Haskins & Reynolds, which had been levied on by an execution in the hands of a constable, issued on a judgment recovered by one Browden against Haskins for his individual debt. Judge Caruthers, in his opinion, stated that the question was whether partnership property can be taken in execution and sold for the private debt of one of the members. The circuit judge held that it could, and gave judgment for the value of the property, and also for $13, damages for the detention of the property which had been taken in the action, against the complainants, Haskins & Reynolds; and this judgment was affirmed by the Supreme Court. Judge Caruthers, in his opinion, says: "Whatever doubts and difficulties may have existed on this subject, the law is now well settled that partnership property may be seized and the interest of one partner sold for his individual debt. The purchaser, however, only takes the interest of such judgment debtor after the settlement and adjustment of the partnership accounts, and not

his proportion of the property sold. What that interest is cannot generally be ascertained until a final adjustment and settlement of the partnership concerns. The effect of the sale and purchase is only to place the purchaser in the shoes of the partner whose interest he buys, and make him a tenant in common with the other partners. This is a necessary consequence of the rule that each partner has a lien upon the firm property, as well for the debts due by the firm as his own share and proportion thereof. The judgment creditor or the purchaser under him must take the interest sold subject to all such liens and claims. To ascertain the interest sold, the purchaser or any of the other partners may file a bill for the settlement of the partnership. The great uncertainty of the value of the interest purchased (for it may be nothing, or more or less than the amount bid) does not affect the principle." In this case it will be noted that the Supreme Court gave judgment against the firm for $13, damages for the retention of the property belonging to the firm. While it is not specifically stated that the property levied on was only a part of the property belonging to the firm, we think it sufficiently appears that it was certain, specific property. In the case of Saunders v. Bartlett, 12 Heisk. 317, a bale of cotton, which was held to be the property of Joyner & Son, had been levied on by an attachment at the suit of Rolfe Saunders, for a debt of Rodney Joyner, Jr., the second member of the firm of Joyner & Son. It was sought to be replevied by Bartlett, Gould & Heath, to whom the property had been consigned. The decision was against the plaintiffs in the replevin suit. But two grounds were stated for the decision in the opinion: First. That there was no right of action in the complainant, because the property was held to be the property of Joyner & Son. Second. Judge Freeman said, in delivering the opinion: "Assuming that the owners were partners, it presents the question whether the sheriff can levy an attachment against one of the partners on the property of the firm, and take possession by virtue of such levy. We think it settled in Tennessee that he may do so under an execution; but he can sell only the interest of the partner against whom the process issued. Haskins v. Everett, 4 Sneed, 531. The same doctrine was laid down in a case of joint ownership. Rains v. McNairy, 4 Humph. 358, 40 Am. Dec. 651. Such seems to be the weight of authority in most of the other states of the Union, as well as in England. In fact, it would seem to follow as a matter of necessity from allowing the interest of the partner to be sold or taken at all under process against him. We therefore hold that the attachment was properly levied on the interest of Rodney Joyner, Jr., whether he was a partner or joint owner; that the sheriff was properly in possession of the cotton; and that the plaintiffs below had not the right to possession as against him." In the case of Morrow v. Fossick, 3 Lea, 129, it is said the right of the creditor to seize the firm property, either by execution or attachment, for the debt of the member of the firm, and sell or ap-

propriate the debtor partner's interest, and ordinarily to file a bill in advance to ascertain that interest, is conceded; citing Haskins v. Everett, 4 Sneed, 531, and 1 Story, Eq. Jur. § 677. In Lincoln Sav. Bank v. Gray, 12 Lea, 459, the case, as shown by the opinion, was substantially that there were two firms of Gray & Co., known as the old and the new, in both of which one T. J. Gray was a partner. The old firm became indebted to the bank, the complainant in the suit; and the case made in the bill was that Gray had used, in the business of the new firm, the property and funds of the old firm. Judge Freeman states that complainant has sought, based on these facts, a decree for its debts against Gray & Co., the old firm, and also the new firm, and has obtained an attachment against the new firm attaching all its effects and assets, and prays that these properties be sold, or a sufficiency to pay the bank, and the proceeds applied to the payment of the debts stated in the bill of Gray as Gray & Co., the old firm. He states this attachment and impounding of these assets has no foundation on which it could have been sustained had proper steps been taken by the defendants to defeat it. "Gray was simply the debtor of complainant, and was a partner in the new firm of Gray & Co., of which Woodard was a member. This certainly gave him no right to have the latter firm wound up without something more. A levy on the interest of one party in a partnership, either of an execution or an attachment levied on such interest, would be the basis on which such relief could be asked, in order that the creditor might have the interest of his debtor ascertained and applied, he having a fixed lien on the same by process." "But we know of no principle on which a simple creditor at large of a member of the firm has such a right." In the case of Boro v. Harris, 13 Lea, 47, Judge Cooper, delivering the opinion of the court, said: "All that an individual creditor of either one of the partners could reach by the levy of an execution, or which a purchaser could acquire under an execution sale, would be the interest of that partner dependent upon a partnership account. Haskins v. Everett, 4 Sneed, 531. And, if the ostensible partners had in fact no interest in the partnership property, the creditor or purchaser, if there were nothing else in the case, would take nothing." There would appear to be in these cases some confusion of principle.

Referring to authorities outside of the state: The confusion and perplexity in which this question is involved is not confined to our own state, but is found in the annunciations of the text-writers on this subject, and in the decisions of nearly all of the courts of last resort of the United States and in England. Mr. Freeman in his work on Executions (2d Ed. § 125), in treating of the matter, says: "It is universally conceded that, except where some statutory provision to the contrary has been enacted, the interest of the partner is liable to an execution for his individual debts. * * * Confessedly, a sale under an execution against one partner does not divest the title of the partnership in the property. It transfers only such interest

as remains in the judgment debtor upon the settlement and adjustment of the affairs of the partnership. As the rights of the partnership are paramount, it would seem that they would preclude the officer serving the writ from taking the property into his exclusive possession, even for the purposes of levy and sale. And this view has been maintained with great force in several decisions pronounced in the Supreme Court of New Hampshire. The authorities elsewhere are almost unanimous in affirming that the officer may, in levying on the interest of a partner, assume exclusive possession of the chattels of the firm, and retain it until the sale. It is also undoubted that the interest subject to execution is, at least in equity, in no respect greater than that held by the defendant; that it is subject to the paramount claims against the partnership, and is in fact nothing beyond the right to demand an accounting, and to share in the surplus that may remain after all the partnership obligations have been discharged. Whether the levy can be upon any specific part of the goods of the firm, and whether, by the sale, the purchaser acquires any interest in the property sold, beyond the right to call for an accounting, are questions upon which the authorities are not agreed. The earlier cases were determined when partnerships were regarded as mere cotenancies. Hence those cases, and such modern cases as have been controlled by them, place sales under execution for the separate debt of a co-partner very much on the same ground as a sale for a separate debt of a co-tenant. Therefore, according to this view, an officer can, under such an execution, levy upon a part as well as upon the whole of the chattels of the firm; and it can, by his sale, transfer a moiety of the legal title, together with the right to take and hold possession against the other partners, levying them without any other means of enforcing the rights of the partnership than by proceedings in chancery. But the courts have gradually progressed towards a realization of the true nature of partnerships, and have therefore come to understand that they are materially different from co-tenancies. A copartner has no right to any specific chattel belonging to the firm, nor has he any right as against the firm to take or hold exclusive possession of any such chattel. The real ownership of all the chattels is vested in the firm. The interest of each partner is merely a right to share in the proceeds of these chattels after all the partnership obligations have been satisfied. Upon what principle can the purchaser at an execution sale be sustained in the exercise of rights to which the defendant was never entitled? Clearly, upon no principle whatever. The precedents made at an early day, when the law of partnership was imperfectly understood, are losing their force as authorities. Their place is being supplied by a line of decisions destined to grow in favor and in number, declaring that the creditor of an individual partner cannot sell any specific article, but only the partner's interest in the whole of the partnership assets, and that the purchaser does not acquire the right to hold possession of

the property purchased as against the other member of the firm, but only an interest in the proceeds, after the business of the firm shall have been settled. Though the right of the officer to seize the property of the partnership under an execution against one of its members is conceded, it must be exercised, as far as possible, in harmony with the rights of the other partners, and not in hostility to them. His power to take and deliver possession of the corpus of the property is merely incidental of the right to reach the interest of the debtor, and is to be exercised only as a means to that end. Consequently, if he exceeds that limit, and undertakes to interfere with the rights of the other partners to a greater extent than is necessary to reach the interest of the debtor partner, and dispose of it, as when, instead of selling the interest of the debtor partner, he undertakes to sell the entire property, though his act is nugatory, such interference renders him liable as a trespasser ab initio." In the same authority (section 251) it is said: "Taking possession is not optional with the officer. He must take possession, or in some way subject the property to his control, in order to make a valid levy and sale. The levy and sale must be consistent with the defendant's interest. If the levy or sale purports to be upon an estate in severalty, this is an invasion of the rights of the co-tenants, who are not parties to the writ, for which they may sustain an action against the officer making it. When the defendant is a member of a copartnership, the duty of the officer must be ascertained from examining the decisions of his own state. The majority of the decisions on this subject are based on the false assumption that a copartnership is a co-tenancy, and therefore sustains the officer in taking exclusive possession of the partnership property under a writ against one member alone. [Citing, among other cases, as authority for this statement, the case of Haskins v. Everett, 4 Sneed, 531.] The minority, based on more correct preceptions of the nature of a copartnership and the rights of its respective members, will not permit a writ against one member to be used to seize all the assets and to suspend the business of the firm. The law with respect to the levy of a writ on a partner's interest in firm property involves many perplexities, the solution of which is worthy of legislative aid. To deny the right to make such a levy may very seriously embarrass creditors of a debtor amply able to discharge their debt; while to admit the right may involve the copartners, and perhaps the creditors of the firm, in very serious inconvenience and substantial loss. Where the levy is permitted, its ultimate effect is to confer on the purchaser thereunder nothing beyond the right to an accounting. This is all the judgment debtor has, and therefore all he can transfer, whether the transfer be voluntary or involuntary. Specific chattels constituting a part of the assets cannot in several of the states be seized and sold under a writ against one of the partners. In other states, the seizure of either a part or the whole of the chattels of a copartnership under a writ against one of its members, and the exclusion of its copartners

from their possession, are unauthorized, and warrant an action of trespass against the officer. But in the majority of the states the right and duty of an officer acting under a writ against a copartner are the same as when acting under a writ against a co-tenant. He may seize any of the property in which the defendant has an interest; may retain possession until the sale; and may then deliver possession to the purchaser, who, in a qualified sense, becomes a co-tenant with the copartners who were not parties to the writ. Whether the latter are entitled to resume possession in the event that the property is needed in liquidating the partnership liabilities, or for other partnership purposes, and, if so, by what remedies their rights may be enforced, are unsolved judicial problems. Though, by the laws of the state in which the officer is acting, he may take exclusive possession of property under a writ against one of its owners, he must confine his levy and sale to the interest of the defendant. If he assumes to levy upon or to sell the whole property, his act, as against the partners or co-tenants not named in the writ, is wrongful. They may regard him as a trespasser upon their rights, or as guilty of an unlawful conversion of their property. He may be sued for trespass or conversion, as the injured co-tenants may elect."

Mr. Parsons, in his work on Principles of Partnership, also discusses these questions, points out the confusion, and says, among other things (section 104): "It is needless to state that a system cannot be coherent while the fundamental principle upon which it rests remains unsettled. * * * An attachment by a separate creditor is sustained upon the ground that the sheriff could seize the firm stock, and sell a partner's interest, which would be treated as a moiety. This is according to the theory of a tenancy in common, or holding by several titles with joint possession, which would be severed by execution, and the purchaser vested with defendant's title and possession. This practice is unsound. The sheriff can, it is true, seize the firm stock in order to sell a partner's interest in it. The execution fi. fa. required a tenable thing for it to operate from; but, the requirement of the writ being satisfied, the sheriff must not disturb or remove the stock, and can sell only the partner's interest in it. The purchaser acquires no right to immediate possession, but merely a claim to the balance, if any is coming to the partner, to be ascertained by an account."

In 17 Am. & Eng. Enc. Law, p. 1336, we find it stated: "The interest of one partner in the partnership property may be attached or taken and sold on execution for his separate debt; but only that portion of the partnership property which belongs to the debtor partner, after paying the debts due to the firm and his own indebtedness to the firm, can be sold. The duty of the sheriff is to attach or levy upon the whole of the partnership effects, or so much of them as may be requisite to satisfy his process [citing in note 3, for this statement, cases from Alabama, Illinois, Indiana, Louisiana, Mississippi, New

York, Pennsylvania, Texas, Virginia, and California], though some of the states permit a levy on specific property less than the whole [citing, as authority for this statement, cases from Kansas, Louisiana, Maine, Missouri, New York, New Jersey, Ohio, and Kentucky]. The creditor acquires no legal interest in the property levied upon, and, until the interest of the debtor becomes a share in common in the buyer by means of a sale, the title is unaffected, and a purchaser from the firm would get a title unincumbered by the levy; and even a judgment against one partner is not such a lien upon the real estate of the firm as to remain an incumbrance after a sale by it. These principles apply to actions brought by a creditor of the partnership against one partner, or to an attachment or levy of execution by a partnership creditor against the individual interest of one partner, as well as to actions upon claims against an individual partner." On page 1310 of the same book we find it stated: "In order to guard against intermediate sales, and to make the levy effectual, the sheriff is, as a general rule, required to take exclusive possession of the property levied upon; such possession not being deemed adverse to the partnership, and the property in his hands being subject to partnership debts"—citing, as authority for this statement, cases from nearly every state in the Union, and among others the Tennessee cases above cited. Continuing, it is said: "In some states, however, the theory is adopted that, as the debtor partner is not entitled to exclusive possession, the sheriff is not, and that, therefore, it is sufficient to declare that there is an attachment or execution, designating the property levied upon, or otherwise, according to local practice"—citing, as authority for this statement, cases from Iowa, Louisiana, Massachusetts, Michigan, New Hampshire, New York, North Carolina, Wisconsin, and the case of Fourth Nat. Bank v. Railroad Co., 11 Wall. (U. S.) 624, 20 L. Ed. 82. Continuing, it is said: "A sale of the entire interest in the property, or any specific part of it, as distinguished from the interest of the debtor partner, will make the officer a trespasser ab initio." It is further stated on page 1313, same book: "The buyer at an execution sale acquires the same title that the debtor partner had, subject to the partnership debts and equities between the partners; the claim of the copartners, or any balance found due them, being considered as a debt, in determining the debtor partner's interest. If the partnership is insolvent, or if the debtor's share is absorbed by the equities of his copartners, the buyer gets nothing. And if the buyer sells or disposes of the whole property, and appropriates the proceeds, he is liable for conversion. That a partnership is insolvent, or that there is no surplus for the debtor partner, does not make the levy a trespass. The property sold continues liable for the joint debts, but the joint creditors have no claim upon the purchase money."

These extracts will show into what confusion this subject has fallen by reason of the early decisions in all the states, evidently based, as stated by the text-writers from whom we have quoted, on an erroneous

conception, or, rather, a failure to recognize the true status of partnership property. It is well settled everywhere that, as to partnership property, partners are trustees of the partnership, as to each other and the advantages derived from it inure to the benefit of the firm. And it is undoubtedly true that a firm or its members could, by injunction, or other appropriate remedy, prevent a partner from diverting partnership property to his individual use, to the damage of the firm, and could prevent him from exercising rights of possession and control which would be destructive of the purposes, or an injury to the business, of the firm. It is also well settled, as a general rule, that an execution cannot reach any higher interest in property than the debtor himself has; and yet all these decisions which justify an officer in taking exclusive possession of firm property would seem to ignore these just principles, which are so absolutely necessary to the successful operation of partnership business. It would seem to be a contradiction of terms and principles to hold that the officer only takes and the purchaser only gets the interest which a partner may have in partnership property after a firm has been wound up and liquidated, and the partner's ultimate interest thus ascertained, and that an officer may seize partnership property, and retain exclusive possession of it until the sale, he thus being enabled to do what the individual partner would have no right to do. And it also seems a violation of fundamental rights, and the taking of private property without compensation, to hold, as we understand was held in the case of Haskins v. Everett, supra, that where a partnership has endeavored to assert its rights of possession by a replevin suit as against an officer who had levied on the property for the individual debt of one of its members, it would be liable for damages for the use and detention of its own property. It would seem that many perplexing questions might arise out of this holding. Suppose different executions were levied on different articles or lots of personal property belonging to a partnership for the individual debt of a member of the firm, and on an accounting and liquidation it was ascertained that the interest of the debtor partner was only sufficient to pay one of the claims; what claim would have priority? It seems to be clear that, as long as property has not been converted by a partner, and is being used, or subject to be used, for the legitimate purposes of the partnership, no partner has any certain or exclusive or special interest in any specific partnership property, but it is the property of the entity, the firm. How, then, can a creditor or an officer take any specific interest in any particular piece of property belonging to the firm under such an execution, levy, and sale? Let us suppose that a creditor having a debt amounting in the aggregate to about $500, as in this case, levies on partnership property worth $3,000, and another creditor, having a debt of $1,500, levies at a subsequent time on another article of partnership property worth $1,500. On an accounting it is ascertained that the debtor partner's interest in the firm at the time of the levies amounted to $1,500. The

property worth $3,000 was sold, and bid in by the execution creditor, at $500, in satisfaction of the first debt mentioned. What will be the result? At the time of the first levy, if the debtor partner is to be charged with one-half the property levied on, as taken out in his interest, it would absorb all his interest in the firm. In other words, does the levy on specific property appropriate any specific property, or only the debtor's interest in the firm? It would seem that by far the more sensible and enlightened method of reaching a partner's interest in the firm would be by garnishment, as provided by statute in Georgia; and, as said in Freem. Ex'ns, it would seem to be a subject deserving of legislative attention. The hardship that might result from carrying out the rule laid down in this state in the cases in 4 Sneed, 531, and 12 Heisk. 317, could be well illustrated by this case, where the firm had a contract to build an extension system of waterworks. A part of the material necessary to the completion of the contract was levied on and sold by an officer for the individual debt of one of the members, and it is stated in the bill that the purchaser, the complainant in this case, notified the other partner that he must not move or do anything with this property until his interest was paid for. It seems that this partner paid no attention to this direction; and it would clearly appear that, if the complainant had had it in his power to enforce the directions given by him, it would not only have resulted in great damage and ruin to the firm's business, but also to the other partner, who was in no way to blame for Wingfield's indebtedness. But, whatever trouble may arise from these holdings we do not feel at liberty, in this court, to depart from what we understand to be well-settled principles in this state. Nor do we wish to be understood as criticising the holdings of our Supreme Court upon this subject, further than to call attention to the seeming inconsistencies that arise therefrom, and which are common to all the earlier cases in almost every state in the Union, as well as in England. But, for the purposes of this case, we may state that we understand the decisions in this state from which we have above quoted to settle the following points: (1) That partnership property may be levied on by the creditor for the individual debt of a member of the firm. (2) That specific property may be levied on, and it is not necessary that the execution be levied upon all the property of the firm. (3) That the officer may, and that in fact it is his duty to, take actual possession of the property levied on, and to retain it until the sale is made. (4) That the purchaser only takes the interest of such judgment debtor after the settlement and adjustment of the partnership accounts, as is the language used in the case of Haskins v. Everett, supra, or a mere right to an accounting, as stated in another case. (5) That, as stated by Judge Freeman in Lincoln Sav. Bank v. Gray, 12 Lea, 459, a levy is necessary in order to fix a lien so as to authorize the filing of a bill.

These points being settled, it results, in our opinion, that the chancellor was in error in dismissing the complainant's bill. While we

think that Hazelhurst had the right to use, and properly, whether by himself, or by the new firm of Hazelhurst & Co., used, the iron which had been levied on, in carrying out the contract and business of the old firm, still it is the logical effect of the decisions which we have quoted that the creditor, Johnson, having the right to have the property levied on, by the sale and purchase took whatever interest Wingfield had in this property at that time, which could only be ascertained by an accounting, and that this he has a right to do. If it shall turn out on an accounting that at the time of the levy the liabilities of the firm, as claimed in the answer filed with the demurrer, exceeded the assets, and that the firm was insolvent, then Johnson will, of course, take nothing by his purchase; and it is also clear that Johnson's interest could not exceed the value of Wingfield's share in all the partnership assets after all partnership debts were paid, and all charges against him in favor of Hazelhurst were settled. The logical result of our cases on this subject seems to be that the taking by the officer has practically the same effect as the withdrawal and conversion of that amount of property by the debtor member of the firm, subject to being compelled to return such an amount of the property after the exhaustion of other partnership property as might be necessary to pay all partnership debts, and to secure to the other partner his just share and division of the partnership assets. For these reasons the decree of the chancellor will be reversed, and the cause remanded to be further proceeded with, with directions to refer the cause to the master to take an account, and to ascertain and report the condition of the old firm of Hazelhurst & Co. at the time of the levies made, as shown in the bill; and the complainant will be entitled to a decree for the value of Wingfield's interest in the property levied on, if any, on the lines indicated in this opinion. The decree of the chancellor is reversed, the demurrer overruled, and the cause remanded, as stated, and the defendants will pay the costs of the appeal.[1]

AULTMAN & CO. v. FULLER, WILLIAMS & CO.

(Supreme Court of Iowa, 1880. 53 Iowa, 60, 4 N. W. 809.)

Action in equity to set aside an execution sale of an undivided half of a threshing machine, and to determine the conflicting claims of the plaintiffs and defendants in relation to the same. The machine was owned by one Tierney and one Cook. The plaintiffs obtained a judgment against both, and the defendants obtained a judgment against Tierney alone. The plaintiffs cause execution to be levied upon the entire machine. The defendants cause execution to be levied upon an undivided half, as being the interest of Tierney. The whole machine was sold to plaintiffs under their execution, and an un-

[1] Affirmed orally by Supreme Court, October 16, 1897.

divided half was sold to defendants under their execution; the sale to defendants being made first. The plaintiffs aver that Tierney and Cook were in partnership, that the machine was partnership property, and that their claim against them was a partnership debt. They also aver that here was no valid levy of the defendants' execution. The defendants for answer make a general denial. Other facts are stated in the opinion. The court dismissed the plaintiffs' petition, and they appeal.

Adams, C. J. * * * We have, then, a case where the defendants, as creditors of one of the partners only, levied upon partnership property for the purpose of collecting their debt. This they might do under a provision of the statute. Section 3053 of the Code of 1873 provides that "when the officer has an execution against a person who owns property in partnership with another, such officer may levy on and take possession of the property owned * * * in partnership sufficiently to enable him to appraise and inventory the same."

The defendants by their levy, if regularly made, acquired a lien upon the interest of Tierney in the property. Code 1873, § 3054. But his interest was not necessarily equivalent to an undivided half of the property. It might be more or less than that, and it might be nothing. His interest was equivalent to such fraction as would constitute his share in the property, after satisfying from the partnership assets all claims against the partnership, whether due to third persons or to his partner. But such interest, of course, was uncertain while the partnership affairs remained unsettled. Possibly it might be sold on execution notwithstanding its uncertainty. Hubbard v. Curtis, 8 Iowa, 1, 74 Am. Dec. 283. It would seem certain that it could be, unless the remedy provided by section 3054 of the Code is to be deemed exclusive of all other remedies. That section provides that, where a debtor partner's interest in firm property is levied upon by his separate creditor, the interest may be ascertained by an action in equity, and the lien acquired by the levy may be enforced in such action. The defendants should, we think, have proceeded under that section. They sold, however, without the ascertainment of Tierney's interest. Whether the sale was void, or not, we need not determine. In purchasing at the sale they certainly acquired nothing more than Tierney's interest, as the same should appear after the partnership liabilities had been discharged. Hubbard v. Curtis, above cited. And the plaintiffs claim that such interest would be nothing. * * *

It is finally insisted by the defendants that the plaintiffs' remedy, if any, is not in equity. But it should be remembered that the defendants had acquired a lien upon the property, which under the statute was enforceable in equity to the extent of Tierney's interest, to be ascertained in an action in equity, if one should be instituted for that purpose. None, however, was instituted. In the meantime the plaintiffs, as partnership creditors, acquired by their levy an interest in the same property. They claim that the defendants have no rights in the

property as against them. As the defendants' rights in the property, if any, could be determined and enforced only by an action in equity, which they neglected to bring, it appears to us that the plaintiffs should be allowed to maintain an action in equity to determine substantially the same question.

In our opinion the court erred in dismissing the plaintiffs' petition. Reversed.[1]

SECTION 2.—IN EQUITY.

RODGERS v. MERANDA et al.

(Supreme Court of Ohio, 1857. 7 Ohio St. 180.)

The original proceeding was a petition for an order of distribution of the separate or individual assets of an insolvent debtor, as between separate and partnership creditors.

It appears from the record that about the 13th of June, 1854, Peter Murray, an insolvent debtor, made an assignment of all his estate, real and personal, to the plaintiff, in trust for the payment of his individual creditors in proportion to the amount of their respective demands. Though possessed of a large and valuable estate, it had been found insufficient to pay his separate debts and liabilities in full. At the date of his failure and assignment he was a partner with John W. Dever in a mercantile firm under the name and style of Dever & Murray; which firm had also become insolvent, and likewise Dever; and the firm had made an assignment of the partnership property and assets about the same time to John Meranda, one of the defendants, in trust for the payment of the joint debts or liabilities of the firm.

In this condition of affairs the partnership creditors, although they have filed their claims with the assignee of the firm for their distributive shares out of the partnership property, claim the right to be admitted to a participation in the dividends of the separate estate of Murray, pari passu with his individual creditors; while the latter

[1] In Willis v. Henderson, 43 Ga. 325 (1871), McCay, J., in holding illegal an execution for the debt of one partner levied against the firm's property, said: "Without doubt, by the common law, it was competent to levy upon and sell the interest of a partner in any property belonging to the partnership. Shaw v. McDonald, 21 Ga. 395. The purchaser got the interest of the partner. He did not get an undivided title equal to the partner's share in the concern according to the agreement, but the interest of the partner after a settlement of the concern affairs. Hoskins v. Johnson, 24 Ga. 625. Evidently this was a very clumsy and often a very unjust mode of enforcing the claims of a creditor against one of the firm. The purchaser did not know what he was buying, since his interest depended altogether upon the result of a settlement of the firm affairs. Our Code (section 1908) prohibits the sale of effects so situated, and provides that the interest of a partner in the partnership assets may be reached by the process of garnishment."

deny the right, and insist that his separate estate shall be applied to the satisfaction of his individual debts in preference to his partnership debts.

It appears, further, that Murray, besides advancing his part of the capital of the firm, also loaned money to the firm to a large amount, for which he held the obligations of the firm, which obligations, by the assignment of Murray, came into the hands of the plaintiff, who has presented the same to the assignee of the firm, and claims to have the same paid out of the assets of the firm, pari passu with the other partnership debts. The other creditors resist this, and plaintiff asks an order of distribution to that effect out of partnership assets.

Defendants demurred to the petition. The court below sustained the demurrer, and gave judgment in favor of the defendants; and this petition in error is filed to review and reverse that judgment.

BARTLEY, C. J. Two questions are presented for determination in this case. The first is whether, in the distribution of the assets of insolvent partners, where there are both individual and partnership assets, the individual creditors of a partner are entitled to be first paid out of the individual effects of their debtor, before the partnership creditors are entitled to any distribution therefrom. It is well settled that, in the distribution of the assets of insolvent partners, the partnership creditors are entitled to a priority in the partnership effects, so that the partnership debts must be settled before any division of the partnership funds can be made among the individual creditors of the several partners. This is incident to the nature of partnership property. It is the right of a partner to have the partnership property applied to the purposes of the firm, and the separate interest of each partner in the partnership property is his share of the surplus after the payment of the partnership debts. And this rule, which gives the partnership creditors a preference in the partnership effects, would seem to produce, in equity, a corresponding and a correlative rule, giving a preference to the individual creditors of a partner in his separate property; so that partnership creditors can, in equity, only look to the surplus of the separate property of a partner, after the payment of his individual debts, and, on the other hand, the individual creditors of a partner can in like manner only claim distribution from the debtor's interest in the surplus of the joint fund after the satisfaction of the partnership creditors. The correctness of this rule, however, has been much controverted; and there has not been always a perfect concurrence in the reasons assigned for it by those courts which have adhered to it. By some it has been said to be an arbitrary rule, established from considerations of convenience; by others, that it rests on the basis that a primary liability attaches to the fund on which the credit was given—that in contracts with a partnership, credit is given on the supposed responsibility of the firm, while in contracts with a partner as an individual reliance is supposed to be placed on his separate responsibility. 3 Kent, Com. 65. And, again,

others have assigned as a reason for the rule that the joint estate is supposed to be benefited to the extent of every credit which is given to the firm, and that the separate estate is, in like manner, presumed to be enlarged by the debts contracted by the individual partner, and that there is consequently a clear equity in confining the creditors, as to preference, to each estate respectively, which has been thus benefited by their transactions. McCulloh v. Dashiell, 1 Har. & G. (Md.) 96, 18 Am. Dec. 271. But these reasons are not entirely satisfactory. So important a rule must have a better foundation to stand upon than a mere consideration of convenience; and practically it is undeniable that those who give credit to a partnership look to the individual responsibility of the partners, as well as that of the firm, and also those who contract with a partner in his separate capacity place reliance on his various resources or means, whether individual or joint. And inasmuch as individual debts are often contracted to raise means which are put into the business of a partnership, and also partnership effects often withdrawn from the firm and appropriated to the separate use of the partners, it cannot be practically true that the separate estate has been benefited to the extent of every credit given to each individual partner, nor that the joint estate has retained from the separate estate of each partner the benefit of every credit given to the firm. Unsatisfactory reasons may weaken confidence in a rule which is well founded.

What, then, is the true foundation of the rule which gives the individual creditor a preference over the partnership creditor in the distribution of the separate estate of a partner? To say that it is a rule of general equity, as has been sometimes said, is not a satisfactory solution of the difficulty; for the question is whether it be a rule of equity or not. In the distribution of the assets of insolvents, equality is equity; and to say that the rule which gives the individual creditor a preference over the partnership creditor in the separate estate of the partner is a rule of equality does not still rid the subject of difficulty. For, leaving the rule to stand which gives the preference to the joint creditors in the partnership property, and perfect equality between the joint and individual creditors is, perhaps, rarely attainable. That it is, however, more equal and just, as a general rule, than any other which can be devised, consistently with the preference to the partnership creditors in the joint estate, cannot be successfully controverted. It originated as a consequence of the rule of priority of partnership creditors in the joint estate, and, for the purpose of justice, became necessary as a correlative rule. With what semblance of equity could one class of creditors, in preference to the rest, be exclusively entitled to the partnership fund, and, concurrently with the rest, entitled to the separate estate of each partner? The joint creditors are no more meritorious than the separate creditors; and it frequently happens that the separate debts are contracted to raise means to carry on the partnership business. Independent of this rule, the joint creditors

have, as a general thing, a great advantage over the separate creditors. Besides being exclusively entitled to the partnership fund, they take their distributive shares in the surplus of the separate estate of each of the several partners after the payment of the separate creditors of each. It is a rule of equity that, where one creditor is in a situation to have two or more distinct securities or funds to rely on, the court will not allow him, neglecting his other funds, to attach himself to one of the funds to the prejudice of those who have a claim upon that and no other to depend on. And besides the advantage which the joint creditors have, arising from the fact that the partnership fund is usually much the largest, as men in trade, in a great majority of cases, embark their all, or the chief part of their property, in it, and besides their distributive rights in the surplus of the separate estate of the other partners, the joint creditors have a degree of security for their debts and facilities for recovering them which the separate creditors have not. They can sell both the joint and the separate estate on an execution, while the separate creditor can sell only the separate property and the interest in the joint effects that may remain to the partners, after the accounts of the debts and effects of the firm are taken, as between the firm and its creditors, and also as between the partners themselves. With all these advantages in favor of the partnership creditors, it would be grossly inequitable to allow them the exclusive benefit of the joint fund, and then a concurrent right with individual creditors to an equal distribution in the separate estate of each partner. What equality and justice is there in allowing partnership creditors, who have been paid 80 per cent. on their debts out of the joint fund, to come in pari passu with the individual creditors of one of the partners, whose separate property will not pay 20 per cent. to his separate creditors? How could that be said to be an equal distribution of the assets of insolvents among their creditors? It is true that an occasional case may arise where the joint effects are proportionably less than the separate assets of an insolvent partner. But, as a general thing, a very decided advantage is given to the partnership creditors, notwithstanding this preference of the individual creditors in the separate property; and that advantage, arising out of the nature of a partnership contract, is unavoidable. Some general rule is necessary; and that must rest on the basis of the unalterable preference of the partnership creditors in the joint effects, and their further right to some claim in the separate property of each of the several partners. The preference, therefore, of the individual creditors of a partner in the distribution of his separate estate results as a principle of equity from the preference of partnership creditors in the partnership funds, and their advantages in having different funds to resort to, while the individual creditors have but one.

It has been argued that partnership contracts are several as well as joint, and consequently have an equal legal right with separate creditors upon the individual property of a partner. But the right

of partnership creditors against the separate property of individual partners in proceedings at law is not in controversy. The question here relates to the relative equitable rights of two classes of creditors in the distribution of the estates of insolvents. Much of the confusion upon this subject has probably arisen from confounding the abstract rights of creditors in proceedings at law with their relative rights to an equitable adjustment in marshaling the assets of insolvents in chancery.

The rule here adopted appears to have been followed in England for nearly a century and a half. We find it distinctly recognized in the case of Ex parte Crowder, 2 Vern. 706, decided in 1715. And in Ex parte Cook, 2 P. Wms. 500, Lord Chancellor King declared it settled as a rule of convenience in bankruptcy that joint creditors should be first paid out of the partnership estate and the separate creditors out of the separate estate of each partner, and, if there be a surplus of the joint estate after paying the joint creditors, the share of each partner should be distributed to his separate creditors, and if, on the other hand, there should be a surplus of the separate estate of a partner after the satisfaction of his individual creditors, it should be applied to any deficiency of the joint funds in the satisfaction of the partnership debts. Lord Hardwicke followed the same rule, in Ex parte Hunter, 1 Atk. 228. But it appears that in Ex parte Hodgson, 2 Bro. C. C., decided in 1785, Lord Thurlow made an innovation on the rule in bankruptcy, declaring that there was no distinction between joint and separate creditors, that they ought to be paid out of the bankrupt's estate and his moiety of the joint estate, and that the joint creditors ought to come in pari passu with the separate creditors. This ruling of Lord Thurlow appears to have had reference to proceedings at law and in bankruptcy, for it is said that, consistently therewith, it was competent for the assignees to confine the joint creditors, where there was a joint estate, to that fund exclusively, by filing a bill in equity against the other partners and obtaining an injunction on the order in bankruptcy. But how far this innovation went, in practice, to affect the ultimate rights of the parties, is wholly immaterial, inasmuch as Lord Loughborough, in Ex parte Elton, 3 Ves. Jr. 238, in the year 1796, restored the rule which previously prevailed, holding that the rule introduced by the Case of Hodgson was inconvenient, inasmuch as every order which he passed in bankruptcy, giving a joint creditor a dividend out of the separate estate of a partner, would give rise to a bill in equity, on the part of the separate creditors, to restrain the order and secure the application of the separate estate to the satisfaction of the separate debts; and, although it was adjudged that a joint creditor might prove his claim under a separate commission, yet he could not receive any dividend therefrom until the amount of his distribution in the joint fund could be ascertained and the claims of the separate creditors satisfied. And the opinion of the Lord Chancellor, in this case, puts an end to the assertion, which

has been sometimes made, that this rule was peculiar to proceedings in bankruptcy. Touching this he said: "If it stands as a rule of law, we must consider what I have always understood to be settled by a vast variety of cases, not only bankruptcy, but upon general equity, that the joint estate is applicable to partnership debts and the separate estate to the separate debts." Again, in speaking of the inconvenience of Lord Thurlow's rule, he said: "What I order here to-day, sitting in bankruptcy, I shall forbid to-morrow, sitting in chancery; for it is quite of course to stop the dividend on a bill filed. The plain rule of distribution is that each estate shall bear its own debts. The equity is so plain that it is of course upon a bill filed."

Lord Eldon, with some characteristic doubts and misgivings, consistently followed this rule of his immediate predecessor. Chiswell v. Gray, 9 Ves. 126; Dutton v. Morrison, 17 Ves. 207. And it has ever since remained the settled law of England, applicable, not simply to proceedings in bankruptcy, but as a general rule of equity, in the distribution of the assets of insolvents.

The supposition that this rule arose from any provision of the statutes concerning bankruptcy in England is a mistake. It was long and well settled as a rule of equity before any statute was enacted touching this subject. It does not appear to have been sanctioned by any positive enactment until St. 6 Geo. IV, c. 16, § 16.

It is not a little remarkable that this rule of equity, so long settled and acted on in England, should have encountered so much opposition as it has in the courts of the several states of this country.

In Pennsylvania the rule was discarded by a majority of the court in the case of Bell v. Newman, 5 Serg. & R. 78, decided in 1819. And the rule adopted in that case was that where a surviving partner dies indebted to partnership and also to individual creditors, and leaving joint assets and also separate assets, the separate creditors should receive as much out of the separate property as the joint creditors could receive from the separate portion or share of such partner in the joint property, and that then the balance of the separate property should be divided pro rata among both classes of creditors. This was placed partly on the ground of equity and partly on the ground of a statute directing equality of distribution of the assets of deceased persons. Judge Gibson, however, dissented, insisting forcibly on the rule adopted in England as a general principle founded in equity.

And it has been insisted that this case did not strictly fall within the application of the principle, inasmuch as the estate to be distributed in that case was the estate of a surviving partner, against which the claims of the joint creditors were as purely legal as those of the separate creditors. And Chief Justice Tilghman remarked, in the opinion of the case, that "no rule was intended to be laid down which may affect cases differently circumstanced."

The case of Sperry's Estate, 1 Ashm. 347, did not directly affect the question, inasmuch as it came fully within the exception that where

there is no joint fund, and no solvent partner, the separate and joint creditors should be paid ratably out of the separate estate. The question was again brought to the attention of the court in that state in Walker v. Eyth, 25 Pa. 216, where the court expresses the opinion that it is a rule of equity "that, where there are partnership and separate creditors, each estate should be applied exclusively to the payment of its own creditors, the joint estate to the joint creditors and the separate estate to the separate creditors." But the question was not directly decided; the decision of the case being put upon another ground. So that the general principle, in a case proper for its application, is said to remain still an open question in Pennsylvania. 1 Am. Law Cases, 483.

In Virginia the question was presented in 1848, in the case of Morris' Adm'r v. Morris' Adm'r, 4 Grat. 293, and was elaborately discussed on both sides; but the court was equally divided on the question of adoption of the rule as a general rule of equity, and the decision of the case was put on other grounds.

In New Jersey, in the case of Wisham v. Lippincott, 9 N. J. Eq. 353, the rule was doubted as a general principle of equity, although not decided.

In Vermont, in the case of Bardwell v. Perry et al., 19 Vt. 292, 47 Am. Dec. 687, the rule was discarded as a principle of equity, with this qualification: that the separate creditors could require, in equity, that the joint creditors should first exhaust the partnership funds, before coming in with the separate creditors of a partner for a pro rata distribution out of his separate estate.

It does not appear that the doctrine of the English courts on this subject was ever adopted as a rule of equity by the courts of Massachusetts; but it is said that a statute was enacted in that state in 1838, providing, as a rule for the distribution of insolvents' estates, that the net proceeds of the separate estate shall go to the separate creditors and that of the partnership estate to the joint creditors.

The rule appears to have been discarded in Connecticut, in the case of Camp v. Grant et al., 21 Conn. 41, 54 Am. Dec. 321, and also in Mississippi, in the case of Dahlgren v. Duncan, 7 Smedes & M. 280, but adopted in Alabama, in Bridge v. McCullough, 27 Ala. 661.

In New York it has been adjudged that "the rule of equity was uniform and stringent that the partnership property of a firm shall all be applied to the partnership debts to the exclusion of the creditors of the individual members of the firm, and that creditors of the latter are to be first paid out of the separate effects of their debtor before the partnership creditors can claim anything therefrom." Jackson v. Cornell, 1 Sandf. Ch. 348. The history of the English rule was somewhat reviewed by Chancellor Kent in Murray v. Murray, 5 Johns. Ch. 60, and upon full consideration adopted as a rule of equity by Chancellor Walworth in Wilder v. Keeler, 3 Paige, 167, 23 Am. Dec.

781, Payne v. Matthews, 6 Paige, 19, 29 Am. Dec. 738, and Hutchinson v. Smith, 7 Paige, 26.

The same doctrine was adopted by Chancellor Desaussure in South Carolina as early as 1811 in Woddrop v. Ward, 3 Desaus. 203, and also by the Supreme Court of New Hampshire in Jarvis v. Brooks, 3 Foster, 136.

The subject was very fully reviewed in the Court of Appeals of Maryland in McCulloh v. Dashiell's Adm'r, 1 Har. & G. 96, 18 Am. Dec. 271, wherein it was settled in that state that in equity the individual creditors of a partner were entitled to a preference over the joint creditors in a distribution of the separate estate of their debtor.

And the same doctrine was settled by the Supreme Court of the United States, on full consideration, in Murrill et al. v. Neill et al., 8 How. 414, 12 L. Ed. 1135.

It has been laid down generally by the elementary writers, both in England and in this country, as a settled rule of equity. * * *

It is argued, however, that this doctrine was overruled in Ohio in the case of Grosvenor v. Austin, 6 Ohio, 104, 25 Am. Dec. 743. It is true that the reasoning of the court in the opinion is to that effect; but the case decided falls within one of the acknowledged exceptions to the rule. Where the partnership has become insolvent, and there are no partnership assets for distribution, and no living solvent partner, it has been uniformly conceded that the principle of the rule does not apply. The case of Grosvenor v. Austin was a bill in equity by the creditors of the firm of Seymour Austin & Calvin Austin for a distributive share with the individual creditors of Seymour Austin out of the assets of his separate estate in the hands of his administrator. There were no partnership assets, and both parties had died insolvent. This was not a case, therefore, for the application of the principle under consideration. And Judge Lane, in delivering the opinion, says as to this rule: "This court are of opinion that, if any such rule exist, it must have been of frequent application, and thus have become familiar to the profession. Yet no case is found in the books, except the one in 9 Vesey and the South Carolina case, that touches such a doctrine, unless cases founded on the statutes of bankruptcy. A claim so novel, in a case necessarily of such common occurrence, must be listened to with caution amounting to jealousy," etc. Touching the subject of this obiter opinion, the following remarks of the Supreme Court of the United States, in Murrill v. Neill, 8 How. 414, 12 L. Ed. 1135, are in point: "The rule in equity governing the administration of insolvent partnerships is one of familiar acceptation and practice. It is one which will be found to have been in practice in this country from the beginning of our judicial history, and to have been generally, if not universally, received. This rule, with one or two eccentric variations in the English practice, which may be noted hereafter, is believed to be identical with that prevailing in England, and is this: That partnership creditors shall, in the first instance, be

satisfied from the partnership estate, and separate or private creditors of the individual partners from the separate or private estate of the partners with whom they have made private and individual contracts, and that the private and individual property of the partners shall not be applied in extinguishment of partnership debts, until the separate and individual creditors of the respective partners shall be paid. The reason and foundation of this rule, or its equality and fairness, the court is not called on to justify. Were these less obvious than they are, it were enough to show the early adoption and general prevalence of this rule to stay the hand of innovation at this day—at least, under any motive less strong than the most urgent propriety." * * *

The remaining matter for determination in this case involves the inquiry whether, in case of an indebtedness for money lent to the partnership by a partner who afterward becomes insolvent, the separate creditors of the latter shall be entitled therefor to a pro rata distribution with the partnership creditors out of the joint fund. It is claimed that the liability of the firm to a partner for money loaned is a partnership debt, and that the individual creditors of that partner are, in equity, entitled to an equal distribution therefor out of the partnership property. On the other hand, it is claimed that as each partner is individually liable for the debts of the firm, and as no partner can be allowed to participate with his own creditors in the distribution of a fund, the separate creditors of a partner, as they can only claim through the rights of their debtor, cannot be allowed such participation with the joint creditors.

It was at one time held to be the law, on the authority of adjudications by Lord Talbot and Lord Hardwicke, that if a partner has loaned money to the partnership, or the partnership has loaned money to the separate estate of one of the partners, according to the equitable rule of distribution of the assets after insolvency, in the former case the separate creditors of the partner would be entitled to an equal share out of the joint assets to the extent of the debt created for the money lent, and that in the latter case the partnership creditors would be entitled to payment to the same extent out of the individual estate of the partner. Ex parte Hunter, 1 Atk. 223; Story on Partn. § 390. But this doctrine has long since been overruled, and the contrary appears now to be well settled. In Ex parte Lodge, 1 Ves. Jr. 166, Lord Thurlow held that the assignees on behalf of the joint estate could not be entitled to distribution out of the estate of Lodge for money which he had abstracted from the partnership, unless he had taken it with fraudulent intent to augment his separate estate. And in Ex parte Harris, 2 Ves. & B. 210, 212, Lord Eldon said: "There has long been an end of the law which prevailed in the time of Lord Hardwicke, whose opinion appears to have been that if the joint estate lent money to the separate estate of one partner, or if one partner lent to the joint estate, proof might be made by the one or the other in each

case. That has been put an end to, among other principles, upon this, certainly, that a partner cannot come in competition with separate creditors of his own, nor as to the joint estate with the joint creditors. The consequence is that if one partner lends £1,000 to the partnership, and they become insolvent in a week, he cannot be a creditor of the partnership, though the money was supplied to the joint estate. So, if the partnership lends to an individual partner, there can be no proof for the joint against the separate estate; that is, in each case no proof to affect the creditors, though the individual partners may certainly have the right against each other."

This doctrine proceeds upon the principle that, in the distribution of the assets of insolvents, the equities of the creditors, whether joint or separate, must be worked out through the medium of the partners; that creditors can only step into the shoes of their immediate debtors in reaching their effects, where there are conflicting claims; and that, inasmuch as an individual partner could not himself come in and compete with the partnership creditors, who are in fact his own creditors, in the distribution of the fund, and thereby prejudice those who were not only creditors of the partnership, but also of himself, therefore the separate creditors of a partner could not enforce any claim to a distributive share of the joint effects against the partnership creditors which could not have been enforced by the partner himself for his own benefit. Story on Partnership, § 390. The rule, however, that these several funds are to be thus administered as they stood at the time of the insolvency, is to be received with this important limitation: That it does not apply in case either where the effects obtained, creating the debt, were taken from the separate estate to augment the joint estate, or from the joint estate to augment the separate, fraudulently, or under circumstances from which fraud may be inferred, or under which it would be implied.

In the case before us, however, it is not pretended that the firm obtained the borrowed money from Murray improperly. The separate creditors of Murray, therefore, are not, on account of this claim for money lent by Murray to the firm, entitled to participate with the partnership creditors in the distribution of the joint effects.

Judgment of the common pleas reversed, and ordered that the separate effects of Peter Murray be distributed pro rata, first among his individual creditors, before any application thereof be made to the payment of the partnership debts of Dever & Murray, and that the partnership effects be applied first to the payment of the partnership debts, irrespective of the claim of the partner, Peter Murray, of money loaned by him to the firm.

DAVIS v. HOWELL.

(Court of Chancery of New Jersey, 1880. 33 N. J. Eq., 72.)

RUNYON, Ch. John C. Bennett and James M. Andrews were, on or about the 10th of February, 1876, partners in business in Phillipsburg. On that day they made an assignment under the assignment act, for the equal benefit of their creditors, to the complainant, William M. Davis. Five days after the making of that assignment Andrews made an assignment under the act for the equal benefit of his creditors to the complainant and Joseph Howell, and about the same time Bennett made a like assignment to Sylvester A. Comstock and Charles F. Fitch. The partnership estate will pay a dividend of only about 11 per cent. of the partnership debts. Most of the partnership creditors have put in their claims under the assignment of Andrews, and claim and insist upon a proportionate participation with his individual creditors therein as to so much of their claims as may not be paid out of the partnership estate, and they threaten the complainant and his co-assignee of Andrews' estate with legal proceedings if their demand be not complied with. The complainant, therefore, comes into this court for protection and instruction as to his duty in the premises. His co-assignee, Howell, is a creditor of Andrews' estate, and he is made a defendant.

The question presented has been often discussed, and, though there exists some contrariety of judicial determination upon it, must be considered as settled by the great-weight of authority. The rule is laid down in the text-books that joint debts are entitled to priority of payment out of the joint estate and separate debts out of the separate estate. Story's Eq. Jur. § 675; Snell's Prin. of Eq. 419; Story on Part. 376; 3 Kent's Com. 64, 65; Pars. on Part. 480. And though the propriety of the rule has been often and persistently questioned, on the ground that it is a violation of principle and devoid of equity, and was originally adopted from considerations of convenience only and in bankruptcy cases, and not on principles of general equity, yet it is so firmly established that it must be regarded as a fixed rule of equity. Its history is so well known and has been so often stated that it is profitless to repeat it. It was declared in 1715, in Ex parte Crowder, 2 Vern. 706; it was affirmed by Lord Hardwicke, and, though Lord Thurlow refused to follow it, it was restored by Lord Loughborough and followed by Lord Eldon; and it has existed ever since in the English Chancery. It has an exception where there is no joint estate and no solvent partner; but where there is any joint estate the rule is to be applied. That part of the rule which gives the joint creditors a preference upon the joint estate has been repeatedly recognized in this state. Cammack v. Johnson, 2 N. J. Eq. 163; Matlack v. James, 13 N. J. Eq. 126; Mittnight v. Smith, 17 N. J. Eq. 259,

88 Am. Dec. 233; Scull v. Alter, 16 N. J. Eq. 147; Hollingshead v. Curtis, 14 N. J. Law, 402; Brown v. Bissett, 21 N. J. Law, 46; Linford v. Linford, 28 N. J. Law, 113. In Scull v. Alter the Supreme Court recognized the rule in all its parts. Chief Justice Hornblower, by whom the opinion of the court was delivered (the question arose under an assignment under the assignment act, and was the same as is presented in this case), said: "But if it is an assignment not only of the partnership effects and property of the firm of Carhart & Britton, but also an individual and several assignment by them of their respective and several estates, then it must be treated as such. The estates and debts must be marshaled, the partnership effects applied in the first instance to the partnership debts, the effects of Carhart applied in the first instance to the payment of his separate debts, and in like manner the effects of Britton to the payment of debts due from him individually."

In Connecticut the rule is not followed, and that part of it which gives the separate creditors a preference upon the separate estate has been repudiated. Camp v. Grant, 21 Conn. 41, 54 Am. Dec. 321. It has been repudiated, also, in certain other states. Bardwell v. Perry, 19 Vt. 292, 47 Am. Dec. 687; Emanuel v. Bird, 19 Ala. 596, 54 Am. Dec. 200. But the doctrine is recognized elsewhere, and has been established after thorough discussion and careful consideration. In Wilder v. Keeler, 3 Paige (N. Y.) 167, 23 Am. Dec. 781, Chancellor Walworth, after a full discussion of the subject, gives the sanction of his weighty opinion to the rule as a doctrine of equity. He says: "In the case now under consideration there was, at the death of G. F. Lush, a large joint fund belonging to the partnership, out of which the joint creditors were entitled to a priority of payment, and out of which several of the joint creditors who have come in under this decree have actually secured a portion of their debts. Nothing but an unbending rule of law should, under such circumstances, induce the court to permit them to come in for the residue of their debts, ratably, with the separate creditors. The amount of the fund which will remain after paying the separate creditors, being a fund which could not be reached at law by the joint creditors, whose remedy survived against the surviving partner alone, must be considered in the nature of equitable assets, and must be distributed among the joint creditors upon the principle of this court that equality is equity." The doctrine was recognized in Morgan v. Skidmore, 55 Barb. (N. Y.) 263. In Pennsylvania, in Bell v. Newman, 5 Serg. & R. (Pa.) 78, 91, 92, Gibson, J. (afterward Chief Justice), in a dissenting opinion strongly supports the rule as one founded on the most substantial justice. In Black's Appeal, 44 Pa. 503, and again in McCormick's Appeal, 55 Pa. 252, the doctrine is completely recognized and affirmed. In South Carolina, in Woddrop v. Price, 3 Desaus. 203, Tunno v. Trezevant, 2 Desaus. 264, and Hall v. Hall, 2 McCord. Eq. 269, the doctrine was held to be a doctrine of equity. In Massachusetts it is established by

statute. In Murrill v. Neill, 8 How. 414, 12 L. Ed. 1135, it is recognized by the Supreme Court of the United States.

The objection that is always pressed as the conclusive argument against it is that partnership debts are several as well as joint, and it is urged that therefore the partnership creditor has an equal claim upon the individual estate with the separate creditor. But it is beyond dispute that in equity the former has a preferred claim upon the partnership estate. To accord to him an equal claim, as to the balance of his debt which the partnership assets may not be sufficient to satisfy with the individual creditor, would be to give him an advantage to which he is not equitably entitled. If he obtains a legal lien on the separate estate, he will not be deprived of it. Wisham v. Lippincott, 9 N. J. Eq. 353; Randolph v. Daly, 16 N. J. Eq. 313; National Bank v. Sprague, 20 N. J. Eq. 13; Howell v. Teel, 29 N. J. Eq. 490. But if he has no such lien, and the assets are to be marshaled in equity, that same equitable doctrine by which the partnership assets are devoted in the first place to the payment of his debt, to the exclusion of the separate creditor, and to which he is indebted for the preference, will in like manner and for like reason give the latter preference upon the separate property. Such was the view of Chancellor Kent. He says: "So far as the partnership property has been acquired by means of partnership debts, those debts have in equity a priority of claim to be discharged, and the separate creditors are only entitled in equity to such payment from the surplus of the joint fund after satisfaction of the joint debts. The equity of the rule, on the other hand, equally requires that the joint creditors should only look to the surplus of the separate estates of the partners after payment of the separate debts. It was a principle of the Roman law, and it has been acknowledged in the equity jurisprudence of Spain, England, and the United States, that partnership debts must be paid out of the partnership estate and private and separate debts out of the private and separate estate of the individual partner." 3 Kent's Com. 64, 65. The obvious infirmity of the objection to the rule is that it leaves out of consideration the fact that it is to equity that the joint creditor is indebted for his preference. It is also urged that, instead of the rule, it would be more equitable to require the joint creditor to have recourse to the partnership property before allowing him to participate in the separate estate, on the equitable ground that he has two funds for the payment of his debt, while the separate creditor has but one; but the rule as established is a rule of justice and equity. It has for its basis the presumption that joint debts have been contracted on the credit of the joint estate and separate debts on that of the separate estate. It has the weight of great authority and long establishment, notwithstanding persistent objection and some fluctuation, and it is based on equitable principles. Sound policy is in its favor. Though there may be, as there are in the case of all such rules, instances in which it works unsatisfactorily, yet that on the whole, and as a rule,

it has not operated unjustly, is evidenced by the fact that it has existed so long (Ex parte Crowder was decided in 1715), notwithstanding opposition, and that in Massachusetts, at least, it has, in the face of the opposition referred to, been established by legislative authority, and that, too, as lately as 1838. In this state it has, as has been shown, the sanction of our judicial tribunals, and it is too firmly established to be disturbed. It is true that in Wisham v. Lippincott, 9 N. J. Eq. 353, 356, the Chancellor expressed strong doubt of its correctness as a general rule; but in the other cases before cited, both previous and subsequent, the rule has been recognized without any expression of disapprobation or dissatisfaction.

There will be a decree that the joint assets be first applied to the payment of the joint debts, and the separate assets to the separate debts, and that the joint creditors may participate in any surplus of the separate assets, which may remain after payment of the separate debts. The costs of the parties will be paid out of the funds represented by the complainant—the partnership estate—and Andrews' estate in equal shares.

HARRIS et al. v. PEABODY et al.

(Supreme Judicial Court of Maine, 1881. 73 Me. 262.)

VIRGIN, J. Royal Williams and James A. Norton, copartners under the firm name of Williams & Norton, upon their own petition were individually and as copartners duly adjudged insolvent debtors. The assets of the partnership, amounting to $1.19 only, were absorbed by the expense of selling the same. Norton's individual estate had no assets, while Williams', after deducting legal costs and charges, amounted to $1,177.36. Against the partnership estate claims amounting to more than $2,200 were proved; against Williams' individual estate, $1,133.67; and against Norton's, no claims. Before the court of insolvency the partnership creditors claimed a pro rata dividend from the separate assets of Williams pari passu with his individual creditors; but the judge denied the claim, and decreed that the assignees should distribute those assets among the individual creditors. Thereupon the complainants brought this bill (claimed by them to be authorized by the insolvent statute [St. 1878, p. 72, c. 74, § 11, as amended by St. 1879, p. 156, c. 154, § 3]), somewhat in the nature of an appeal from the decree of the judge of insolvency; and the parties have brought the case before us on an agreed statement, reserving the question of jurisdiction of this court, which is expressly raised. * * *

The next question is, was the decree of the court of insolvency correct in ordering a distribution of Williams' individual assets among his separate creditors, to the exclusion of the complainants, the creditors of the firm. The respondents rely upon the provisions of St. 1878, p. 86, c. 74, § 54, and certain cases cited on their brief.

It is familiar history that as early as 1715 Lord Chancellor Harcourt laid down as the rule of administering the joint and separate estates in bankruptcy that the joint estate shall be applied in payment of the partnership debts, and the separate estate of the separate debts; any surplus of either estate being carried over to the other. Ex parte Crowder, 2 Vern. 706. This doctrine was followed by Lord Chancellor King in Ex parte Cook, 2 P. Wms. 500. But it seems that this rule was departed from by Lord Thurlow, who let in creditors of the firm concurrently with the separate creditors upon the separate estate, upon the ground that they were equally creditors of the firm and of the partners. Ex parte Cobham, 1 Bro. C. C. 576; Ex parte Hodgson, 2 Bro. C. C. 5; Ex parte Page, 2 Bro. C. C. 119. The former rule was restored, however, by Lord Loughborough (Ex parte Elton, 3 Ves. 239; Ex parte Abell, 4 Ves. 837), confirmed by Lord Eldon (Ex parte Clay, 6 Ves. 813; Ex parte Taitt, 16 Ves. 193), and it has been the prevailing general rule ever since in England (Lindl. Part. [3d Eng. Ed.] 1201; Robs. Bank. 584; Colly. Part. [Perkins' Ed.] 775, 776; Lodge v. Prichard, 1 De G., G. & S. 609), and in this country as well. Among the numerous cases, see Wilder v. Keeler, 3 Paige (N. Y.) 167, 23 Am. Dec. 781; Payne v. Matthews, 6 Paige (N. Y.) 19, 29 Am. Dec. 738; Murray v. Murray, 5 Johns. Ch. (N. Y.) 60; 3 Kent, 64, 65; Story, Part. §§ 376–378; In re Marwick, 2 Ware, 233; Pars. Part. 480 et seq., and notes. This rule was also adopted in the United States bankrupt law of 1841 (Act Aug. 19, 1841 c. 9, § 14, 5 Stat. 448), in the United States bankrupt law of 1867 (Act March 2, 1867, c. 176, § 36, 14 Stat. 534; Rev. St. U. S. § 5121), in the insolvent laws of Massachusetts (St. 1837–38, p. 475, c. 163, § 21), and in the insolvent laws of this state (St. 1878, p. 86, c. 74, § 54). Jarvis v. Brooks, 23 N. H. 136.

This rule applies to the estates as they exist when the parties are declared bankrupt or insolvent, and not before; for the creditors of the firm have no lien upon its property which can prevent the partners from bona fide changing its character and converting it into separate estate of one of them prior thereto. Ex parte Ruffin, 6 Ves. 119; Case v. Beauregard, 99 U. S. 119, 25 L. Ed. 370; Robb v. Mudge, 14 Gray (Mass.) 534.

The reasons assigned for giving the partnership creditors the preference over the joint estate in bankruptcy have been various. But the view generally taken founds it, not upon any lien or superior claim which they primarily have, but upon a privilege or preference, sometimes denominated a lien, "derived from the equitable right which each partner, who being liable for all the partnership debts, and whose interest in its property being simply his share of the residue after payment of its debts and settlements of its accounts, consequently has, that the partnership property shall go to pay its debts in preference to those of any individual partner." Case v. Beauregard, supra; Johnson v. Hersey, 70 Me. 74, 35 Am. Rep. 303; Washburn v. Bank, 19 Vt. 286,

288. It has also been said that this priority in joint assets and equality in the separate are founded on the fact that the partnership creditor trusted each and all partners while the separate creditor trusted but one, and that natural justice warrants the marshaling of the assets so as to give the former the preference (Brock v. Bateman, 25 Ohio St. 609); that it is familiar law that a creditor of a partnership, having recovered a judgment against it, may satisfy his execution against partnership property or against the individual property of any of the partners (Tucker v. Oxley, 5 Cranch [U. S.] 34, 40, 3 L. Ed. 29; Egery v. Howard, 64 Me. 68, 73; Washburn v. Bank, supra); and in the case of intervening insolvency, having two funds from which to satisfy his claim, the principle familiar in marshaling assets or securities comes in and compels him to exhaust the fund to which he has the exclusive right before he be allowed to compete with a creditor who has a claim only on one of the funds (Ex parte Elton, 3 Ves. 240; 1 Story, Eq. § 558). Lord Justice Turner said: "This rule may perhaps proceed upon this: That the joint estate is clearly liable both at law and in equity for the joint debts—at law by reason of the survivorship, and in equity by virtue of the rights of the partners inter se to have it so applied—and that the separate estate is as clearly liable, both at law and in equity, for the separate debts, and that carrying over the surplus of the one estate to the other, although it may not strictly work out the rights, may afford the best means of adjusting the complications which arise from the joint estate being liable for the separate debts only so far as the interest of the partners from whom the debts may be due may extend, and from the separate estates, if taken for the joint debts, having recourse over against the joint estates, and which arise also from the equities between the parties." Lodge v. Prichard, supra. Prof. Parsons suggests the ground that a partnership is a distinct entity, contracting its own debts, having its own creditors, and possessing its own property applicable to its debts; that, when it has ceased to exist, it is resolved into its elements, and the relations between its members and creditors arise. If the joint debts have been paid, the former partners share the remaining property. If the joint funds are not sufficient to pay its debts, they who were its members become the debtors of the joint creditors. Pars. Part. 346, 347.

The rule that each estate is to be applied to its own debts, and the surplus of each to the creditors remaining of the other, is applicable only to the facts upon which it is predicated; i. e., when there is joint estate, and all the partners are insolvent. But, if there is no available joint estate and no solvent partner, then the creditors of the partnership have no exclusive fund to exhaust, but may share concurrently with the separate creditors the separate estate. Ex parte Hayden, 1 Bro. C. C. 454, and notes in Perkins' Ed. 398; Colly. Part. § 926; Lindl. Part. 1234; Story, Part. § 380; Pars. Part. 482. In some of the cases this is called an exception to the rule. Prof. Parsons says

that, "instead of being an exception, it is a case that falls without the rule." Others say it is a part of the rule. Judge Drummond, after stating what he denominates "the well-established rule upon the subject," says: "It is partly on the ground that, although it is a debt of the firm, it is still a debt against each individual member of it, for the satisfaction of which the property of each is responsible, and that, being the only source to resort to for the payment of the debt of the firm, it should be appropriated as well to pay the debts due from the firm as from the individual members." In re Knight, 8 Nat. Bankr. Rep. 436, 438, Fed. Cas. No. 7,880. The same doctrine prevails in all the federal District Courts. In re Marwick, 2 Ware, 233; Bump, Bankruptcy (9th Ed.) 771, and cases there cited. Such, evidently, is the opinion of Mr. Justice Clifford. Amsink v. Bean, 11 Nat. Bankr. Rep. 495, 22 Wall. 395, 22 L. Ed. 801, and the case of Ex parte Leland, 5 Nat. Bankr. Rep. 222, Fed. Cas. No. 8,228, which he there cites.

We are aware that this question has been decided otherwise in Massachusetts (Howe v. Lawrence, 9 Cush. 553, 57 Am. Dec. 68, and Somerset Potters' Works v. Minot, 10 Cush. 592); but the answer of Judge Drummond is more satisfactory to our minds (In re Knight, supra). Neither does the dictum of Mr. Justice Daniel outweigh the great weight of current authority. See, also, Rogers v. Meranda, 7 Ohio St. 179; Brock v. Bateman, 25 Ohio St. 609.

It seems there were some joint assets, though not enough to pay the cost of selling; and hence (in the language of the statute) no "net proceeds." In such case there should be considered no joint assets, though, when there are any available joint assets, however small in value, the rule is applicable. Lindl. Part. 1235; Colly. Part. § 926. Story, Part. § 380, says they must be enough to be "available." The question is thoroughly examined in Re McEwen, 12 Nat. Bankr. Rep. 11, Fed. Cas. No. 8,783. As recently as December, 1880, the question came before Judge Choate (S. D. N. Y.), who said: "It is, however, unnecessary to go into this question, because in a recent decision, which is conclusive on this court, the right of firm creditors to share pari passu with individual creditors in the individual estate has been recognized and enforced, where the firm, as well as the individual partners, had been adjudicated, and the firm assets were not more than sufficient to pay the costs and expenses properly chargeable to the firm estate. In re Slocum (D. C. Vt. Oct. 4, 1879) Fed. Cas. No. 12,951; affirmed on review by Blatchford, C. J., December 13, 1880." Fed. Cas. No. 12,950. In re Litchfield (D. C.) 5 Fed. 47, 50.

Decreed that the partnership creditors of Williams and Norton are entitled to dividends from the assets of the estate of Royal Williams, pari passu with his separate creditors.

In re MARWICK.

(United States District Court for Maine, 1845. 2 Ware, 229. Fed. Cas. No. 9,181.)

This was a case of objection to a proof of a debt. Albert Marwick, the bankrupt, in May, 1837, entered into a copartnership with one Frederick Davis, and as partners they purchased a quantity of provisions for the Georgia Lumber Company to the amount of $800, for which they drew their bill on the company in favor of one Bradbury. Before the bill was paid the company failed, and the failure of the company produced that of the copartnership of Marwick & Davis, by which the firm was dissolved. They afterwards gave their joint note for the sum remaining due, viz., $740.88. This note Bradbury for a valuable consideration transferred to Dole, with notice that it was a partnership debt. The assignee of Marwick & Davis rendered in his account of the joint estate, October 25, 1841, showing outstanding demands in favor of the firm to the amount of $13,000, which comprised the whole assets of the firm, and which were all represented as utterly worthless. Dole, the creditor, proved his debt June 17, 1842. The assignee, after rendering his first account, applied for liberty to compromise or sell the claim against the Georgia Lumber Company, which was disposed of for $10, of which a supplementary account was rendered, and the amount paid into court April 25, 1845, to the credit of the joint estate. The final account of the assignee of the separate estate showed assets to the amount of $515.93. Two debts have been proved and allowed against the estate—one by Charles E. Marwick for $684.04, and the debt of Dole. Marwick objected to the admission of Dole's debt against the separate estate.

Ware, District Judge. Two questions have been raised and argued in the present case. The first is whether the creditors of a copartnership can in any case be admitted to prove their claims against the separate estate of one of the copartners, for the purpose of receiving dividends in concurrence with the separate creditors of the copartner. The second is whether, admitting that they may in some cases, the partnership creditors can be admitted so to prove under the facts in this case. * * *

This general rule for marshaling the assets and claims is taken from the English bankrupt law; but under that system there are exceptions as well established as the rule itself. One of these exceptions is where there is no joint estate and no living solvent partner, as is the fact in the present case. In such a case the joint creditors are allowed to prove and receive dividends against the separate estate, in concurrence with the separate creditors. Story, Part. § 372; Eden, Bankr. Law, 172. But to bring the case within the exception there must be absolutely no joint estate. If there be any, however small, the exception is not allowed, and it has been rejected where the joint estate amounted only to £1. 11s. 6d. And again there must be no living

solvent partner; and "solvent" is here used, not in its ordinary sense —that is, an ability to pay the whole of one's debts—but in the sense of nonbankrupt partner. For, though he may be in fact insolvent and unable to pay the whole of his debts, if he be not actually in legal bankruptcy, the exception is excluded, and the general rule prevails. Ex parte Janson, 3 Madd. 229. * * *

It appears from the proofs in the case, or the facts which are admitted, that the assignee rendered in his first account of the partnership estate in October, 1844, in which the whole assets, consisting of outstanding demands, are represented as worthless; that afterwards he applied for liberty to compromise or collect a debt, on which he obtained $40, and rendered into court a supplementary account; and it further appears, that the money to take up this note was actually advanced by Charles E. Marwick, as creditor of the separate estate. Now, the argument is that if the exception to the general rule of marshaling the assets and debts, established under the English bankrupt system, may be admitted under our statute, then, as it is founded on the general principles of equity and distributive justice, a creditor of the separate estate ought not to be permitted to defeat the equity of the joint creditor by purchasing for a small sum a partnership demand, for which nothing could have been obtained but for this purpose. Allowing the premises on which the argument is founded to be correct, it does seem to present itself with some force to the equitable consideration of the court. The effect in the present case will be that the separate creditor will receive nearly the whole of his claim and the joint creditors but a small percentage, if each is restricted to his own appropriate fund.

But after considerable reflection I have come to the conclusion that, admitting the assumption on which the argument is founded, it cannot prevail. * * *

My opinion, on the whole, is that the proof cannot be admitted against the separate estate, in competition with the separate creditors.

THAYER v. HUMPHREY.

DAVIES v. SAME.

(Supreme Court of Wisconsin, 1895. 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. Rep. 887.)

J. D. Putnam and Alfred G. Goss were partners in the milling business under the name of J. D. Putnam & Co. The partnership was dissolved by mutual consent; the business being thenceforward carried on by J. B. Goss alone at the same place under the name of J. B. Goss & Co., who assumed all the debts of J. D. Putnam & Co. The firm property of J. D. Putnam & Co. was conveyed to J. B. Goss.

Lottie Thayer was a creditor for money lent to J. D. Putnam & Co. After the dissolution she took the note of J. B. Goss & Co. for her claim against J. D. Putnam & Co. She afterwards recovered judgment on this note against J. B. Goss and Alfred J. Goss, in form joint and several. The trial court found that Alfred J. Goss was not a partner with J. B. Goss in the firm of J. B. Goss & Co., but that he was liable to Thayer by reason of his being held out to her as a partner. Alfred J. Goss, being insolvent, made an assignment for the benefit of his creditors to Humphrey. J. B. Goss, likewise, being insolvent, assigned to one Weld all his property, including the remaining assets of J. D. Putnam & Co. J. D. Putnam was also insolvent. Thayer filed her claim, based on her judgment, with Humphrey, seeking to participate pari passu with the individual creditors of A. J. Goss in the distribution of his separate assets.

The court held that she must first go against the partnership assets, and could not go against the individual assets of A. J. Goss until his separate creditors were paid. From this order Thayer appealed.

Davies was also a creditor of J. D. Putnam & Co., but did not accept J. B. Goss & Co. as a substitute for his original debtor. He is not a creditor of either J. B. Goss or J. B. Goss & Co. He also filed his claim with Humphrey, seeking to participate in the distribution of the separate assets of A. J. Goss. The court held that he must first go against the assets in the hands of the assignee of J. B. Goss. From this order Davies appealed.

Marshall, J. * * * Now, in this situation, can the creditors of J. B. Goss, doing business as J. B. Goss & Co., who are so circumstanced as to be entitled to hold J. B. Goss and A. J. Goss liable as members of an ostensible firm—and all the creditors, at least of the new concern, including those having claims against the old firm that, by arrangement with them, have been assumed and made debts of J. B. Goss & Co., are so circumstanced in fact—prove their claims pari passu with the individual creditors of A. J. Goss in his assignment? Also, can the creditors of the firm of J. D. Putnam & Co. so prove? * * *

There are several propositions of law that apply which are well established—too well to need to be more than stated—among which are that the assets of an insolvent partnership, in insolvency proceedings, must be applied first to the payment of the partnership debts; that, generally speaking, partnership creditors cannot prove in competition with the individual creditors of a partner; that the fixed rule is that joint estate must go to joint creditors, and separate estate to separate creditors, though the former may prove pari passu with separate creditors, when there is no living solvent partner and no partnership assets. Now, in this case there is no solvent partner. J. D. Putnam, J. B. Goss, and A. J. Goss are all insolvent. So, keeping in mind the above-stated propositions of law, the vital question is: Are there any partnership assets to which appellants can resort? If

there are such, then the foundation stone, upon which they construct their claim of right to share pari passu with the individual creditors of A. J. Goss, disappears.

On that subject we shall not attempt to harmonize the large number of cases that can be found in this country. The simple question of whether, when there is an ostensible firm, by holding out to creditors generally, the property of such firm is to be considered, in equity, joint property for the administration thereof, in insolvency, the same as if such property belonged to a firm in fact, is the key to the situation. That it ought to be so considered is, we assume, too clear for argument; that is to say, if A. and B. do business with persons generally as A. & Co., and incur liabilities to such persons who deal in good faith, believing that there is a firm in fact as well as in name, and, under such circumstances, that they have a right to believe it is composed of A. and B., and the business becomes insolvent, the property of the ostensible firm should be considered, to all intents and purposes, in regard to the administration of the business in insolvency under the control and direction of a court of equity, the same as if they were partners in fact. The doctrine that estops B. from saying that he is not a partner of A. at the suit of the creditors of the ostensible firm should estop A. from holding that the property is his individual property, to the prejudice of those who dealt with the firm as a firm in fact, and should estop the creditors of the ostensible firm, in the case of the bankruptcy of such firm, from resorting primarily to the individual property of the members of such firm; in short, should work effectually to compel liquidation in all respects the same as if the members of such firm were just what they seem to be. This is what the doctrine of estoppel is for; that is what equity is supposed to accomplish,—to prevent fraud and promote justice between man and man in the administration of human affairs. And we are therefore prepared to find that such is the law as substantially declared by the court of appeals in chancery of England.

In Re Rowland and Crankshaw, 1 Ch. App. 421, the precise question here under consideration was presented. The business was conducted in the name of Rowland & Co. Crankshaw was held to be the ostensible partner, in a contest to determine whether the property should be administered in bankruptcy as joint property of Crankshaw and Rowland, partners, or as the individual property of the one who was the actual owner. The opinion of the court, which, being short, can best be stated by quoting it in full so far as relates to the particular question under consideration, is by Lord Cranworth, as follows: "In the administration of bankruptcy, it has been the object from the earliest times to apportion the assets, as fairly as possible, between the joint and separate creditors. There is found much difficulty in doing this satisfactorily, but some rules have been clearly laid down; for instance, that the joint property pays the joint creditors, and the separate property pays the separate creditors. Now,

what is said here is that this estate, though said to be joint, is, in fact, separate. These two gentlemen traded under the name of Rowland & Co., and tradesmen supplied them with large quantities of goods, and thus they became bankrupt; and now it is said that they were not partners, and that the real arrangement between them was that everything belonged to Crankshaw. That is no reason; and, as Crankshaw suffered Rowland to trade in the name of the firm, any persons trading with him are entitled to say that Rowland & Co. are the persons with whom they dealt, and the goods are joint goods." This is a most concise statement of the law, as held by the English Court of Chancery. The meaning is too plain and unmistakable to leave any room for discussion, and we find that the rule so tersely stated has been adhered to, and repeatedly approved, in subsequent cases, in language rather tending to extend than restrict the principle involved. In Ex parte Sheen (In re Wright) 6 Ch. Div. 235, the question was again before the court, where the circumstances were that there was no general holding out, and the court held that where there is no ostensible partnership by a holding out to creditors generally, but only a holding out to two or three creditors, the facts are not sufficient to make the property of the alleged ostensible firm joint estate. This, though not referring to, inferentially approves, In re Rowland and Crankshaw. In Ex parte Hayman (In re Pulsford) 8 Ch. Div. 11, the question again came before the Court of Chancery, on appeal from the Chief Judge in Bankruptcy, and In re Rowland and Crankshaw was expressly approved. The case so clearly covers the two cases under consideration that we quote liberally from the opinion, after stating the facts. Such facts are as follows: Prior and up to August 31, 1875, Hayman, Catford, and Pulsford carried on business as Hayman, Pulsford & Co. On that date the firm was dissolved, and notice was published stating the fact. At the same time a letter was sent to each of the persons with whom the firm had done business, stating the fact of dissolution, and that thereafter the business would be carried on by Thomas Pulsford, under the style of Pulsford, Son & Co. Thereafter the business was so conducted. Tom Pulsford, the son of Thomas Pulsford, took an active part in conducting the business up to the time the insolvency occurred, when Thomas Pulsford filed a petition in bankruptcy; and on the suggestion that, on account of the way the business had been conducted, it might be held that the father and son were partners, a petition was also filed by them as joint traders. The creditors resolved upon a liquidation by arrangement, and such resolution was registered. Hayman, a separate creditor of the father, in respect to matters outside the firm of Pulsford, Son & Co., appealed from the order for a liquidation of the business as that of a firm, on the ground that there was no partnership. He prevailed, and the registration was canceled, and the decree was not appealed from. Thereafter the father and son signed a declaration in insolvency, upon which Ravenscroft, a creditor, presented a petition al-

leging that they had treated father and son as partners, under the firm name of Pulsford, Son & Co., on which an adjudication was made against them by consent. Hayman then appealed to the court to annul the adjudication. On this application, following In re Rowland and Crankshaw, the application was dismissed on the ground that, though no actual partnership had subsisted between father and son, yet the son had been held out as a partner to the petitioning creditor to such an extent as to enable him to maintain the adjudication. This decision was not appealed from. Hayman then applied to the court for an order declaring that all, or such portion as the court should think proper, of the estate which appeared in the acts of the bankrupts or either of them as joint estate, formed part of the separate estate of the father, and for a direction that the trustee should treat the same accordingly as separate estate of the father. Hayman was the only separate creditor; that is, creditor outside those of the business of Pulsford, Son & Co. On the hearing, the evidence showed that substantially all the creditors did business with Pulsford, Son & Co. as a firm consisting of the father and son, though it appeared that the father was the actual owner of the business, and that there was no firm in fact. Hayman's application was refused, and he appealed. On the hearing of this appeal in the Chancery Division of the High Court of Justice, James, L. J., propounded to appellant's counsel the following interrogatory: "If I go to a shop, and find the names Thompson & Jones on the door, and I go in, and find Thompson and Jones selling goods, am I not warranted in believing that they are partners?" to which answer was made in effect: "That would not change the nature of the assets, and make property which belonged to the father in fact the joint property of father and son"—just as it is claimed in this case, it will be observed. Appellants contend that the fact of holding out sufficient to constitute an ostensible firm of J. B. Goss & Co. will not change the nature of the assets so as to make the individual property of J. B. Goss joint property, in equity, of J. B. Goss & Co. The positions are identical. In the opinion of the court this is answered by James, L. J. After reciting the facts in Re Rowland and Crankshaw, as in Lord Cranworth's opinion in that case, he says: "Every point of that judgment applies to this case, with this single exception, which fact is in favor of the decision of the registrar, that, instead of the words used being '& Co.,' which is an ambiguous term, and might mean anybody in the world, the words are 'Pulsford, Son & Co.' But it is said that this conclusion will work hardship to the appellant, who is a creditor of the father alone. I think that is only one of those misfortunes which occur to persons who deal with others who afterwards become insolvent and become bankrupt, having partners. The hardship would have been exactly the same upon Hayman if there had been a real partnership created by a formal instrument. The same consequences would then have happened as happen where there is only an ostensible partnership." It

will be distinctly noted at this point that the court makes no distinction in the administration of estates of an ostensible and an actual firm in bankruptcy. The Lord Justice proceeds: "The rule has been established that joint creditors take the joint estate, and separate creditors take the separate estate; and you only have to consider what is joint and what is separate estate; and you must apply the rule independently of the hardship. The supposed hardships are those which it may inflict in any particular case. We can only apply the fixed rule that that which is joint estate shall go to the joint creditors, and that which is separate estate shall go to the separate creditors."

The reasoning of these cases is, in our opinion, unanswerable, and we deduce therefrom the principle of law that, if a person allows another to carry on business in such a way as to amount to a holding out to persons generally that he and such other are partners, and credit is given to both on the supposition that they are partners in fact, the property with which such business is carried on, though in law that of such person, in equity will be treated as the joint property of such person and such other; and neither of them, nor the creditors of either, can prove up in insolvency in competition with the creditors who have trusted the two as partners and the business as that of the two. To the same effect is Van Kleeck v. McCabe, 87 Mich. 599, 49 N. W. 872, 24 Am. St. Rep. 182. Applying the law thus stated to the question under consideration, the conclusion is easily reached that, while there are no firm assets at law of the ostensible firm of J. B. Goss & Co., all the property used by J. B. Goss in conducting the business, in equity, is the joint property of such ostensible firm, and to it all the creditors of such ostensible firm can resort, the same in all respects as if there had been a firm in fact.

This effectually disposes of the appeal of appellant Lottie Thayer, though it is as effectually ruled by the law applicable to the Davies appeal, as will appear by what follows. Appellant Davies never became a creditor of J. B. Goss or of J. B. Goss & Co., by any agreement to which he was a party; and, while his appeal presents the question of whether there is any joint property to which he can resort, such question involves a different question from the one discussed as particularly applicable to the Thayer appeal.

We must start the discussion of the Davies appeal with the propositions of law—in respect to which though, there is some conflict, they are too well established by the great weight of authority to be questioned by this court—that partnership creditors have no lien on the partnership assets independent of the equity of the partners, but must work out their preference over the individual creditors of the members of the partnership through the equities of such members; that, so long as the equity of the individual members of the partnership exists to have the partnership property applied to the partnership debts, the creditors have the equity to compel its enforcement; that if one member sells his interest, bona fide, to his copartner or a stran-

ger, without in any way retaining his equity to have the partnership creditors paid out of it, the joint property is thereby converted into the individual property of the purchaser. The question to be determined is, in view of the facts that the sale was made by Putnam in consideration of the debts of the partnership being paid; that the firm was insolvent at the time; that the whole transaction was really made by him to relieve himself from the partnership liability; that the property was put into the possession of J. B. Goss for the purpose of continuing the same business with the same assets, and effect a settlement of the old partnership affairs—all of which clearly appears, can it be held that the equitable title to the property was changed, so as to affect the equitable right of Putnam to have the creditors of the old firm paid out of it, or were the equitable rights of the outgoing partner and the creditors preserved by reason of the facts, and the assets in the hands of J. B. Goss impressed with a trust to carry out the intention of the parties? In discussing these questions, full effect should be given to the significant controlling words, in the rule correctly stated in Willis v. Satterfield, 85 Tex. 301, 20 S. W. 155: "Bona fide, without in any manner retaining the lien." In Conroy v. Woods, 13 Cal. 626, 73 Am. Dec. 605, it was held that where a sale is made by one partner to his copartner, and the consideration for the sale is the payment of the partnership debts, the sale is not "bona fide," within the meaning of the rule, so as to cut off the equity of the vendor to have the property applied to the payment of the partnership debts. Very few cases can be found that go as far as the California court on this subject, except in the New Hampshire court, which does so, holding that the creditor has an equitable interest independent of the equity of the individual partner. In Ex parte Cooper, 1 Mont., D. & D. 358, and Ex parte Williams, 11 Ves. 3, it is held that where an outgoing partner sells bona fide to his copartner, and takes for his consideration an agreement that the purchaser shall pay the debts, no equitable interest in the property is retained. To the same effect are Stanton v. Westover, 101 N. Y. 265, 4 N. E. 529; Fulton v. Hughes, 63 Miss. 61; Dimon v. Hazard, 32 N. Y. 65; and many other cases that might be cited. In Darby v. Gilligan, 33 W. Va. 246, 10 S. E. 400, 6 L. R. A. 740, it is held that where a firm is insolvent, if a partner sells out to his copartner, and the purchaser agrees to pay the firm debts, the sale cannot be considered bona fide, so as to cut off the equity of the firm creditors to be preferred; and to the same effect is Olson v. Morrison, 29 Mich. 395. In the latter case Olson and Jones were partners, Olson sold out to Morrison, the consideration being that the vendee should pay the debts of the firm. It sufficiently appears that the firm was insolvent. The vendee neglected to comply with his agreement, and the creditors, joining with the vendor, brought suit to compel performance of the agreement, and to subject the property to the payment of the partnership debts. Held, that the agreement to pay the debts as consideration for the transfer was a sufficient recognition of the eq-

uitable lien of the partnership creditors, tracing the same through the equity of the vendor, to enable them, joining with him, to enforce such equity. In Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683, it was held that, as between the firm and its creditors, the title of the former to the joint property is not divested by any separate transfers to outside parties for the individual benefit of the respective vendors, and that, when there has been no transfer by the firm as such, conveying the corpus of the property, and it remains in specie, though transferred by the separate transfers of the individual members, it may yet be followed and reached in the hands of those claiming under such separate transfers, by creditors of the firm. This is upon the theory that neither partner separately has any interest in the corpus of the property; that his interest is limited to his proportionate share of what remains after a settlement of all partnership obligations and an accounting between himself and his copartner. A distinction is drawn in this case between a bona fide sale by one of a partnership to two of his copartners without reservation, which, under the prevailing rule of Ex parte Ruffin, 6 Ves. 119, operates to liberate the assets from the partnership liability, and a sale made by one member of a firm of more than two, to one of the partners, or to an outside party. In that class of cases the New York courts have uniformly held, since Menagh v. Whitwell, that the partnership effects are not liberated from the partnership liability. In this case, if it is held that the sale was really to J. B. Goss, under the New York rule, the corpus of the property never passed by any act of the firm, so as to change the equitable title in respect to creditors existing at the time of the sale. The trend of the New York cases, since Menagh v. Whitwell, has been to extend the rule which preserves the equity of the creditors in case of the sale by one of the members of an insolvent firm, the purchaser assuming the partnership obligations in place of the outgoing partner, whether such sale is to a copartner or otherwise. This clearly appears by the following, from the opinion in Bulger v. Rosa, 119 N. Y. 465, 24 N. E. 853: "The equity of the firm creditors cannot be defeated by any attempted conversion of the assets of the insolvent firm into the individual assets of one of the partners, through a transfer by one partner of his interest therein to the other. In such a case, till the assets come to the hands of a bona fide purchaser, the same can be reached by the partnership creditors." To the same effect are Nordlinger v. Anderson, 123 N. Y. 544, 25 N. E. 992, and Peyser v. Myers, 135 N. Y. 599, 32 N. E. 699. In the latter case there had been a change in the firm some time prior to the assignment for the benefit of creditors, the new firm not having made any express contract to pay the old firm debts. There were two sets of creditors, and, in discussing the subject of their equitable rights, the court said: "The priority of the lien of firm creditors is not divested by the transfer by an insolvent firm of the assets to one or more of the partners, nor can it be affected by any mere change in the personnel of the firm, as by the withdrawal of

one partner from the firm or the introduction of another." See, also, Phelps v. McNeely, 66 Mo. 554, 27 Am. Rep. 378, where it was held that if a partner sells out his interest in the firm to his copartner, who agrees to pay the debts, the firm being at the time insolvent, the equities of the creditors are preserved. The evidence in that case tended to show that there was no property, other than that formerly belonging to the partnership, out of which the firm debts could be paid; but it does not clearly appear whether the court rested its decision on the ground that there was an implied promise under the circumstances to pay the firm debts out of the partnership assets, or on the ground that the insolvency of the firm impeached the bona fides of the transaction. The court went further, and held that, notwithstanding the vendee of the property had turned the same out to secure his individual creditors, who had received it as security in good faith, it could, nevertheless, be reached by the partnership creditors; but this was subsequently overruled in Re Edwards, Goddard Peck Grocery Co. v. McCune, 122 Mo. 426, 25 S. W. 904, 29 L. R. A. 681.

We might go on at great length, reviewing decisions on this subject, and cite numerous authorities where outgoing partners have been held to retain their equity to have the firm debts paid, and the rights of the creditors to the assets which have come under the control of equity have been worked out through the equity of such partners. Probably there are few questions upon which there is such a conflict of authority as the one under consideration; but nearly all are in harmony with the principle that if the bona fides of the transaction is impeached, or if the equity is retained by agreement, express or implied, then the creditors can enforce such equity. The conflict chiefly arises in regard to what circumstances or facts are sufficient to impeach the good faith of the transaction, and in respect to what is sufficient to show a contract that the partnership debts shall be paid out of the partnership assets, and impress a trust upon such assets for that purpose.

By the mere fact of the dissolution of a partnership by one member selling out to his copartner or to a stranger, the purchaser or purchasers agreeing, as consideration for the purchase, to pay the partnership debts, the firm being insolvent at the time, no presumption of a bona fide agreement arises which will operate to change the equitable title of the property; and such agreement must clearly appear to exist inconsistent with the continuance of the equitable rights of the partner, and, through him, of the partnership creditors; else it is retained. Lindl. Partn. 699. If the circumstances are such as to show that the property was merely transferred for the purpose of winding up the affairs of the concern, there being no express agreement that the property shall be exclusively that of the vendee, it will, in case of bankruptcy, be distributed as joint estate. Id. 699, 700. This is upon the presumption that such was the intention of the parties. The presumptions to be indulged in, in such cases, rather go to support an implied agree-

ment to do what in equity and good conscience the parties ought to do. In Sedam v. Williams, 4 McLean, 51, Fed. Cas. No. 12,609, and Marsh v. Bennett, 5 McLean, 117, Fed. Cas. No. 9,110, it was held that the equity was retained to have the partnership creditors paid out of the partnership assets, and that such assets were impressed with a trust for that purpose by virtue of an express agreement. In Re Dawson, 59 Hun, 239, 12 N. Y. Supp. 781, which does not appear to have been appealed from or criticised, it was held that where one member of a firm retires, selling out his interest to a third party, who continues the business with the remaining partner, with whom he enters into partnership, and the partnership assumes the debts of the previous firm, and such new firm becomes insolvent, and makes an assignment for the benefit of creditors, the property transferred to the new firm becomes charged in equity with a trust for the payment of the debts of the old firm, which the outgoing partner may enforce. Such holding is certainly equitable and just when applied to a state of facts, as in this case, which leaves no room for doubt but that it was the intention of all the parties dealing with the property to preserve and administer the partnership assets in the nature of a trust to liquidate the old debts; and to this extent we expressly approve of and apply it here.

This does not in the least trench upon the rule that if a partner sells out, bona fide, his interest in the partnership assets and business, without in any manner retaining his equity to have the partnership creditors paid out of such assets, he waives his equity in that regard, but is perfectly consistent with it. If the agreement was express that the debts shall be paid out of the assets, then the equity is retained by express contract; if the circumstances of the transaction show that the contemplation of the parties was that the debts should be so paid, then the equity is retained by implied agreement; and the assets are, in the administration of the affairs of the purchaser in insolvency, as effectually impressed with a trust in favor of the vendor, and, through him, the creditors of the old partnership, in the one case as in the other. The circumstances involved in these appeals point unerringly to the conclusion that it was the intention of J. D. Putnam, J. B. Goss, and A. J. Goss that the new concern of J. B. Goss & Co. should continue the old business with the same assets, for the primary purpose of winding up such business and liquidating the debts theretofore contracted in it out of the old assets, so far as practicable. Hence the court below, sitting as a court of equity in the administration of the affairs of A. J. Goss and J. B. Goss, was warranted in concluding that the property of J. B. Goss is impressed with a trust to carry out the intention of all the parties concerned in the dissolution of the old firm, and formation of the new concern of J. B. Goss & Co.; that the debts of the old firm should be assumed by the new concern, and be paid out of the property turned over to it, and the operations of the business, so far as this can be done with due regard to the equities of the creditors who trusted such new concern.

[After stating that the two sets of creditors—those of J. D. Putnam & Co. and of J. B. Goss & Co.—can all prove in the insolvency proceedings of J. B. Goss, the opinion concludes:]

This effectually disposes of all the questions presented, and leads to the conclusion that neither of the appellants can prove pari passu with the individual creditors of A. J. Goss in his assignment, but they can both prove pari passu with all the creditors of the ostensible firm of J. B. Goss & Co. in the assignment of J. B. Goss. * * *

NEWMAN, J., in a dissenting opinion, in which PINNEY, J., concurred, said:

It may be true—it is not necessary to question it—that Alfred J. Goss is estopped, as against this petitioner, to deny that he was a partner with James B. Goss, and that there were, in fact, partnership assets. But this does not aid the petitioner, nor bring her nearer to a remedy against these assets, until it is also established that James B. Goss and his individual creditors are bound by a like estoppel. That cannot be established in this proceeding, because neither the necessary parties are before the court, nor the evidence by which it is to be established. And there is great danger of doing the petitioner an irreparable wrong if, with so little knowledge of the actual situation, her remedy is limited by the court to those assets; for, at the best, it is but a desperate chance. It is said that James B. Goss is also estopped to deny the alleged partnership and the joint ownership of the property used in it. But the court has not listened yet to James B. Goss' side of that question. It is assumed, without proof, that he permitted Alfred J. Goss to hold himself out as a partner, and the property and business as partnership property and business. * * * But it is not very important whether James B. Goss shall, when the question is presented, be held to be estopped or not. A much more important question will be whether his individual creditors are estopped from claiming that these assets, which are in the hands of his assignee for their benefit, were really his individual assets. No one questions that they were his individual assets in law, and they are his individual assets in equity, unless these individual creditors are estopped to claim them as such. Now, there really is no evidence in the case which shows the nature of these debts to the individual creditors of James B. Goss. It seems to be assumed by the majority that they were all debts contracted to persons who gave credit to an ostensible partnership; while, in truth, there is no evidence on the subject. There is nothing to show that these debts are not all due to persons who dealt with him, in good faith, relying upon his apparent sole responsibility, from the possession of this property, and his sole conduct of the business. Nor does it appear whether these debts were contracted in the milling business, or whether they were the misfortunes of independent enterprises. In this condition of the case, it certainly cannot be prudent to decide this question of which set of creditors have the superior equity to these assets. * * *

SWANN et al. v. SANBORN et al.

(United States Circuit Court, Northern District of Florida. 1878. 4 Woods. 625, Fed. Cas. No. 13,675.)

The bill was filed by Samuel A. Swann and others, claiming to be creditors of a partnership which, it was alleged, carried on the business of manufacturing lumber, and which, it was alleged, was composed of F. S. Chester, the bankrupt, E. N. Chester, Franklin E. Town, and Horace Stillman. * * *

The prayer of the bill was that the assets of the late firm of Chester & Co., which had been returned to the bankrupt court as assets of the bankrupt estate of F. S. Chester, and were in the possession of his assignee, might be adjudged primarily liable for the debts of the firm of Chester & Co., and enable complainants to subject such assets to the payment of their claims. The District Court made a decree substantially in accordance with the prayer of the bill, and the defendants appealed to the Circuit Court. * * *

Woods, Circuit Judge. * * * As to the claim, made by the bill, that E. N. Chester and F. E. Town were partners in the firm of Chester & Co., the evidence shows conclusively that they were not in fact partners; but it shows that, with the knowledge of F. S. Chester, they held themselves out as such. The truth is that there was, in fact, no such firm. The property all belonged to F. S. Chester. It was bought with his money, and owned by him exclusively. Now, under this state of facts, which class of creditors is entitled to priority of payment of the supposed partnership? F. S. Chester never reported that E. N. Chester and Town were part owners of the mill and other property of Chester & Co. His exclusive title to this property could not be divested by any statements made in relation thereto by E. N. Chester and Town. If the firm of Chester & Co. existed as to strangers, it was a firm in which F. N. Chester owned all the property, and the other partners were interested only in the business, in its gains and profits. All the products of the business—all the lumber made, for instance—were liable for the partnership debts; but the individual property of one of the partners, even though used by the partnership to carry on its business, was liable in the first instance for the individual debts of the owner. Murrill v. Neill, 8 How. 414, 12 L. Ed. 1135. If I am right upon this proposition, the prayer of the bill that this property may be first subjected to the payment of the partnership debts cannot be sustained. It is individual, and not partnership, property, and must be first applied to the individual debts of the owner. * * *

The case is that Stillman loaned $30,000 to F. S. Chester, to be used for the erection of his mill and the carrying on of the business. F. S. Chester was the only one of the three persons engaged in any way in the enterprise who had any money. The property used in the

business was all his individual property, and did not belong to the firm. The property was bought with money furnished by Stillman, under an agreement that he should be secured by mortgages upon it. He has mortgages of record to the amount of $23,000, which appears to be the full value of the property. The assignee of F. S. Chester is entitled to this property; for it is the individual property of F. S. Chester, and cannot be taken for his partnership debts until his individual debts are paid. The property will not pay these debts. The complainants' partnership creditors have, therefore, no claim to this property, and their bill seeking to subject it to their debts must be dismissed, at their costs.

Decree accordingly.

SECTION 3.—INSOLVENCY OR BANKRUPTCY—APPLICATION OF ASSETS.

HAWKINS et al. v. MAHONEY et al.

(Supreme Court of Minnesota, 1898. 71 Minn. 155, 73 N. W. 720.)

START, C. J. Arthur H. Ives and Amos P. Ireland, partners under the firm name of Ives, Ireland & Co., duly made an assignment of all of their partnership and unexempt individual property, for the benefit of their creditors, under the insolvent laws of this state. The net assets of the partnership, for distribution, amount to $3,151.65, and the partnership debts are $19,736.34. Ireland's net individual assets are $4,000; and his individual debts, $2,997.47. Ives' net assets are $100, and his personal debts, $415.40. Included in the firm debts proved is that of the Irish-American Bank, for $4,078.89, which is based upon the notes of the firm given to the bank for a loan by it to the firm, in the sum of $4,000, and signed by the firm, and by Ireland in his individual name. There is also included in the firm debts that of the St. Anthony Falls Bank, for $5,512.50, which is based upon notes executed by the firm to it for a loan of $5,500, but none of the notes were signed by either of the individual partners. Each of these banks made the loan to the firm in express reliance upon the individual property and credit of Ireland. The trial court, by its order of distribution, directed the assignee to pay the net assets of the firm, pro rata, to the firm creditors, including the Irish-American Bank; net individual assets of Ireland, pro rata, to his individual creditors, excluding the firm creditors, except the Irish-American Bank, which was included therein to the full amount of its debt, without any deduction for the payment thereon it was to receive by its dividend from the firm assets; and the net assets of Ives to his individual creditors. The assignee

and certain firm creditors appealed from this order. The appeals present two general questions for our decision. They are, did the trial court err (a) in distributing the firm assets to the firm creditors, and the individual assets to the individual creditors? (b) in directing a dividend to be paid to the Irish-American Bank from both funds?

1. The trial court adopted the general equity rule in insolvency and bankruptcy for the distribution of firm and individual assets, respectively, which is that, where there are both partnership and individual assets for distribution, the partnership assets will be first applied to the payment of partnership debts, and the individual assets, in like manner, to the payment of the individual debts of the partners. If there is a surplus in either fund after paying in full the creditors to whom it primarily belongs, it is carried to the other fund, and distributed as a part thereof. The rule seems to be limited to cases where there are substantial firm assets for distribution. This we do not decide. The first half of the rule, that equity gives to the firm creditors priority in the firm assets over the creditors of the individual partners, is conclusively settled, and everywhere accepted as the law; but the other and reciprocal half of the rule, that the separate debts of the partners are to be first paid from the individual assets, has been controverted by able courts in this country, while those which have adhered to it have not always agreed as to the reasons for its adoption. The principles upon which the rule rests are clearly stated in the dissenting opinion of Chief Justice Gibson in the case of Bell v. Newman, 5 Serg. & R. (Pa.) 91, and the opinion of Chief Justice Bartley in Rodgers v. Meranda, 7 Ohio St. 179. The latter wrote thus of the rule: "That it is, however, more equal and just, as a general rule, than any other which can be devised, consistently with the preference to the partnership creditors in the joint estate, cannot be successfully controverted. It originated as a consequence of the rule of priority of partnership creditors in the joint estate, and, for the purposes of justice, became necessary, as a correlative rule. With what semblance of equity could one class of creditors, in preference to the rest, be exclusively entitled to the partnership fund, and concurrently with the rest entitled to the separate estate of each partner? The joint creditors are no more meritorious than the separate creditors, and it frequently happens that the separate debts are contracted to carry on the partnership business." Judge Story, in his time, declared the rule to be firmly established. He, however, questioned its equity and propriety, but added, "Such as it is, however, it is for the public repose that it should be left undisturbed, as it may not be easy to substitute any other rule which would uniformly work with perfect equality and equity in the mass of intricate transactions connected with commercial operations." Story, Partn. §§ 377, 382. The rule was expressly approved by Chancellor Kent, who declared it to rest upon just and obvious principles of equity,

and to be settled by a series of English and American decisions. 3 Kent, Comm. *65. Prof. Parsons declared it to be distinctively settled, and a simple rule, eminently practical, and founded upon obvious principles of policy. T. Pars. Partn. pp. 382, 383. Whatever question there may have been as to this rule half a century ago, it is now thoroughly and decidedly established by the great weight and number of adjudged cases, and must be followed, unless it is contrary to the letter or spirit of our insolvency law. The assignee claims that it is so, in that it violates the fundamental principles of equal distribution and no preferences, upon which the insolvency law rests, and asks us to adopt the Kentucky rule, which is, in effect, that where a firm is insolvent, and there are both firm and individual assets to be distributed to firm and individual creditors, the partnership assets are to be distributed exclusively to the firm creditors; then the individual creditors are to receive a percentage on their claims from the individual assets, equal to that received by the firm creditors on their claims from the partnership assets; and the balance, if any, to all of the creditors, pro rata. Bank v. Keizer, 2 Duv. 169. The original of this rule seems to be the rule adopted in Pennsylvania, in Bell v. Newman, 5 Serg. & R. 77, for the distribution of firm and individual assets, in a case where a surviving partner died, leaving both partnership and separate creditors, and firm and separate assets in the hands of his administrator. Gibson, J., dissented, and, in his opinion, ably vindicated the equity rule, and tersely stated the objections to the rule laid down in the opinion of the court, in these words: "It is evident, therefore, the rule would operate unequally, by making the separate creditors share their fund with the joint creditors, where it happens to be the largest, without subjecting the latter to share theirs under like circumstances. It may be said, it is impossible to put them on a footing in this respect. I grant that it cannot be done on any plan of participating in the same fund, but you precisely put them on a footing by making each fund bear the burden of its own debts; and, if that of the separate creditors should happen to be the most productive, I know not on what principle of equity they can be deprived of the advantage." Bell v. Newman was practically overruled in Black's Appeal, 44 Pa. 503, and the equity rule adopted. The objections to the now discarded rule of Pennsylvania apply precisely to the Kentucky rule, which has not, so far as we are advised, been followed by any other court. As to the claim that the equity rule is contrary to the express prohibition of our insolvency law as to preferences, it is to be noted that the equity rule is the unquestioned rule in England for the distribution in bankruptcy of the firm and separate assets, and was expressly adopted by section 14 of the federal bankruptcy act of 1841, and section 36 of the act of 1867. This is significant, for the prohibition of preferences is a pronounced feature of all bankrupt laws, and especially so of the bankrupt acts of 1841 and 1867. If it be held that the prohibi-

tion of preferences in our insolvency law abrogates any part of the equity rule, the whole thereof is annulled, and firm and individual assets constitute a single fund, to be distributed to firm and individual creditors pro rata. It is clear that the law cannot be so construed, and that the prohibition as to preferences relates to, and is directed against, the acts of the insolvents. The same suggestions apply with equal force to the claim that the requirement of the insolvency law of equality in the distribution of the net assets to the creditors abrogates the equity rule. It is difficult to see upon what principle we can consistently hold, as we are, in effect, asked to do by the assignee, that the equity rule is annulled by the provisions of the insolvent law forbidding preferences, and requiring equality of distribution, and adopt in place of it the Kentucky rule; for the latter permits the firm creditors to have the exclusive benefit of the firm assets, if they are greater and pay a greater dividend to firm creditors than the individual assets do to individual creditors; but, if they are less, then, and only then, the two classes of creditors share equally. The firm creditors never share their fund with the separate creditors, but the latter must share theirs with the former, whenever it is the largest. If one of these rules is forbidden by the insolvency law, the other is, also. The fact that the insolvency law contains no directions for marshaling the assets of insolvents where there are different classes of creditors and different funds, indicates that it was the intention of the Legislature to leave the settled equity rule in force. The insolvency law's requirement of equality and no preferences is subordinate to the settled equities and priorities of partnership creditors in and to the firm assets, and the correlative equities and priorities of the separate creditors in and to the separate assets, when the assets are marshaled and distributed by the court in insolvency proceedings. The direction of the statute for the equal distribution of the insolvent's property means a distribution in accordance with the recognized rules of equity. See Hanson v. Metcalf, 46 Minn. 25, 48 N. W. 441; Kells v. McClure, 69 Minn. 60, 71 N. W. 827. * * *

2. The claim of the Irish-American Bank was based upon promissory notes executed by the firm of Ives, Ireland & Co., and by Ireland in his individual name; and for this reason the trial court permitted the bank to receive a dividend on the full amount of its claim, from both the partnership and individual funds. The trial court's order in this respect is claimed to be erroneous, for the reason that the consideration of the notes determines the character of the debt, which was for money loaned to, and used by, the firm; hence it is immaterial whether or not the individual name of the partner is on the notes, for with or without it they represent a partnership debt, for which he is liable; consequently the bank has no equities superior to the other firm creditors. The question of double proof in such a case is not a new one. It was at one time the rule in England that

a creditor holding a note signed by the firm and an individual partner must, in bankruptcy, elect which estate he would prove his claim against. The rule is, and always has been, otherwise in this country, and it is settled by a very decided weight of authority that such double proof is permissible. T. Pars. Partn. p. 390; 2 Bates, Partn. § 841; 17 Am. & Eng. Enc. Law, 1210; Emery v. Bank, 7 Nat. Bankr. Rep. 217, Fed. Cas. No. 4,446; In re Bradley, 2 Biss. 515, Fed. Cas. No. 1,772; Ex parte Nason, 70 Me. 363; Roger Williams Nat. Bank v. Hall, 160 Mass. 171, 35 N. E. 666. It is true, as claimed, that the federal bankrupt law provided for double proof in certain cases; but Judge Clifford, in Emery v. Bank, clearly indicates, independent of the statute, that where a creditor has taken the precaution, before parting with his money, to secure an express written contract for its repayment from both the firm and the individual partner, his right is clear, in case of bankruptcy, to the benefit of his caution, and to prove his claim against, and receive a dividend from, the fund belonging to the partnership, and also from the estate of the individual partner. This precise question was involved in the cases of Ex parte Nason and Bank v. Hall, supra, and in each the rule as to double proof was maintained on principle. In the last-named case the court, after citing the authorities in support of the rule, concludes thus: "In view of the modern decisions, and the general agreement of opinion, we think it unnecessary to argue elaborately for the right of a creditor who has required two contracts, binding two distinct estates, to insist upon both." Our conclusion on this question is that the Irish-American Bank was entitled to receive a dividend on its claim from both funds. The trial court, however, directed a dividend to be paid to it from both funds, concurrently, on the full amount of its debt. There are authorities sustaining this part of the order but it is manifestly inequitable to other creditors. When the bank receives a dividend from the firm assets, the primary fund for the payment of its claim, its debt is paid pro tanto; and to permit it to receive a dividend from the individual assets, on the part of its debt paid from the firm assets, to the prejudice of other creditors, is not just, and therefore not legal, in the absence of any statute declaring it to be so. It follows that the order appealed from must be modified so as to permit the bank to receive a dividend from the individual assets of Ireland only on the balance of its claim after applying as a payment its dividend from the firm assets, and that this case must be remanded, with direction to the district court to so do.[1]

[1] Mitchell and Canty, JJ., do not concur in permitting double proof.

MILLER'S RIVER NATIONAL BANK v. JEFFERSON.

(Supreme Judicial Court of Massachusetts, 1884. 138 Mass. 111.)

Holmes, J. The Miller's River National Bank discounted a draft of the firm of Goodman, Schofield & Co., consisting of Goodman, Hale and Schofield, who are now in insolvency individually and as a firm. As a condition of making the discount, the bank required security to be given for the whole indebtedness of the firm to it, including previous advances, as well as the draft. Goodman and Hale accordingly transferred to the bank promissory notes of the firm owned by them respectively, and given for advances made by them to the firm. These notes were payable on demand. The discounted draft had been paid before the insolvency proceedings were begun, but some of the previous advances had not been; and the question is whether the bank can prove the collateral notes, after having already proved for the whole amount of the unpaid advances.

The statutes and decisions have applied the maxim that equality is equity in a somewhat mechanical way to the distribution of insolvent estates. But we know of no authority applicable to this case that goes beyond preventing parties from taking a larger proportion of the fund than they or those whom they represent may be supposed to have contributed to it. If the principal and the collateral claim represent two distinct contributions, there is nothing in the general policy of the insolvent law opposed to double proof. If, for instance, a stranger to the firm had held these notes for advances made by him, and had pledged them to the bank to secure it for its subsequent advance, the pledged notes, being provable before, would not cease to be so when pledged, and the pledgee would hold any balance received above its debt as trustee for the pledgor.

In the present case the collateral notes represent distinct contributions as much as in the case just supposed—contributions from members of the firm, to be sure, who are liable in solidum for the firm debts, but still contributions diminishing their separate estates and swelling that of the firm. Even in the hands of a partner, they would be recognized as debts, and, although the partner would not be allowed to prove them in competition with his own creditors, if there was a surplus he would be let in, and, according to many decisions, would have to be paid in full before any dividend could be paid in respect of capital.

This being so, what substantial reason is there why a holder for value should not receive dividends to the extent of his interest, like a pledgee of accommodation paper? It is true that the consideration which gives this particular debt its capacity to compete with the claims of other creditors is the advance to the firm, and that that advance has already been proved to its full amount. But, if the bank had made a separate purchase of these notes, it could prove them,

although such a purchase would add nothing to the fund appropriated to the firm creditors. In this case the bank is equally a holder for value, and the transfer of the collateral notes was part of the consideration for the advance to the firm.

Again, at the time the notes were transferred to the bank, the bank could have maintained an action upon them. Thayer v. Buffum, 11 Metc. 398; Richards v. Fisher, 2 Allen, 527. Without implying that the right to maintain an action and the right to prove in insolvency are coextensive, it may be said that one follows from the other pretty directly when the general policy of the insolvent laws has been satisfied.

The fact that the notes were payable on demand makes no difference. Pub. St. 1882, c. 77, § 14, no more subjects indorsees to a partner's disability to prove than it does to his disability to sue. Thayer v. Buffum and Richards v. Fisher, ubi supra.

If the obstacles to proving the collateral notes, considered as contracts of the firm, are overcome, we do not understand the defendants to argue that they present any further difficulties in their aspect of securities, or to deny that a creditor holding security from one partner, like one holding it from a stranger, may retain his security and prove for the full amount of his debt.

Judgment for the plaintiff.

ALLEN v. DANIELSON, Assignee, et al.

(Supreme Court of Rhode Island, 1887. 15 R. I. 480, 8 Atl. 705.)

DURFEE, C. J. The assignment under which the questions in this case are raised conveys all the property of the assignors, except such as is exempt from attachment by law, to the assignee, in trust to sell and convert it into money, and apply the proceeds to the payment, first, of certain claims entitled or allowed to be preferred, and then "for the equal benefit of all our creditors in proportion to their respective claims." At the time of the assignment some of the general creditors held claims which were secured by mortgage.

The first question is whether the creditors so secured were entitled to dividends on their full claims pro rata with the other creditors. The rule in bankruptcy, both in England and in this country, where we have a bankrupt law, is that creditors so secured shall have dividends only on the residue of their claims after converting and applying the security, or after deducting its appraised or agreed value. This rule has been applied sometimes in the settlement of an insolvent estate after the death of the debtor, or under his assignment; but, according to the decided weight of authority, the rule is to allow all the creditors to bring in their claims in full, and have dividends accordingly; it being the duty of the personal representative or assignee,

if a secured debt is so reduced by the dividends that the security will more than pay it, to redeem for the benefit of the creditors. 1 Story, Eq. Jur. § 564b; Bisp. Eq. § 343; Jones, Pledges, § 587; Mason v. Bogg, 2 Mylne & C. 443; In re Xeres Wine Shipping Co., L. R. 3 Ch. 771; Moses v. Ranlet, 2 N. H. 488; West v. Bank, 19 Vt. 403; Walker v. Baxter, 26 Vt. 710; Findlay v. Hosmer, 2 Conn. 350; Logan v. Anderson, 18 B. Mon. (Ky.) 114; Citizens' Bank of Paris v. Patterson, 78 Ky. 291; Shunk's Appeal, 2 Pa. 304; Miller's Estate, 82 Pa. 113, 22 Am. Rep. 754; Van Mater v. Ely, 12 N. J. Eq. 271; Evertson v. Booth, 19 Johns. (N. Y.) 486; Jervis v. Smith, 7 Abb. Prac. (N. S.) (N. Y.) 217; Bates v. Paddock, 118 Ill. 524, 9 N. E. 257, 59 Am. Rep. 383.

The ground of decision in these cases is that the creditors are severally creditors to the full amount of their claims, and are therefore entitled to dividends to the full amount; the security being regarded as something collateral, which does not reduce the debt, but only secures the creditor pro tanto, in case the debtor or his estate cannot pay the debt in full. And in the case at bar this is the rule which comports with the language of the assignment declaring the trust, namely, that the assignee shall apply the proceeds, after paying the preferred creditors, "for the equal benefit of all our creditors, in proportion to their respective claims," not in proportion to their claims less the value of any securities which they hold.

In the case of Re Knowles, 13 R. I. 90, this court allowed a creditor under an assignment who was secured, and who, after the presentation of her claim, had converted and applied her security, to share with the other creditors only to the extent of her unpaid residue. The case was a petition for an opinion on a case stated, and was doubtless submitted without full argument or presentation of authorities, so that the court, prepossessed in favor of the rule in bankruptcy on the score of equality, and by familiarity with it, and wishing to avoid a diversity of rules, supposing that there were two lines of decision of about equal authority to choose between, naturally, without the consideration which it might otherwise have bestowed, chose that line of decision which was in accord with the rule in bankruptcy. The case is not without respectable support. Amory v. Francis, 16 Mass. 308; Farnum v. Boutelle, 13 Metc. (Mass.) 159; Wurtz v. Hart, 13 Iowa, 515. But we have no doubt we should have decided the case differently if we had before us when we decided it the same array of authorities which we have before us now. The question, then, is, shall we adhere to it out of regard for the maxim stare decisis, or shall we adopt what we now consider the sounder rule? We have come to the conclusion that, considering how recently the case was decided, very little harm will come from overruling it, and that by doing so we shall not only establish the correct rule, but also, which is no inconsiderable gain, establish the rule which is generally prevalent elsewhere.

It appears in the case at bar that the assignee has already made two dividends. No part of the first was paid to the secured creditors when it was made, it being then supposed that the mortgaged property would suffice to pay them in full. Before the second dividend the mortgaged property was sold, and the proceeds were found to be insufficient, quite a large residue of indebtedness remaining unpaid. The assignee, in making the second dividend, recognized the secured creditors, in accordance with the rule laid down in Re Knowles, as creditors to the extent of the unpaid residue, and allowed them as such to share pro rata with the other creditors in the second dividend and also made up to them for not participating in the first dividend. The assignee now has more assets to be applied, and the creditors who were secured contend that they are entitled to be paid out of said assets so much as is necessary to put them on an equality with the other creditors, on the basis of their claims in full, before any third dividend is made. * * *

Our decision is that the creditors who were secured are entitled to receive out of the funds in the hands of the assignee so much as will put them in a par proportionately with the other creditors, on the basis of their claims as they were when the assignment was made, before any other dividend, provided that what they receive shall not exceed what remains due to them as creditors, if the assignee has so much. If the assignee happens not to have so much, we do not think he is bound to make good the deficiency out of his own means, he having acted in good faith under the rule as laid down on Re Knowles, with the acquiescence of the creditors, in making the former dividends.[1]

[1] "The agreement between the debtor and creditor was that the debt should be paid. That debt was a definite quantity, and nothing less than its full amount can be said to be the debt. It is not altered or affected in its amount because the creditor may hold some collateral security. That is not a factor of the debt, but is merely an incident to the debt. The very force and meaning of a collateral security are in the idea of a guaranty of the performance of the principal agreement, which was to pay the debt. The property which a creditor holds as collateral to the indebtedness of his debtor secures him to that extent, in case his debt is not paid in full by the debtor or by his estate. As between the creditor and his debtor, the latter could not compel the former to resort first to his collaterals before asserting his claim by a personal suit. The debtor has no control over the application of the collaterals. It is a general rule of equity that the creditor is not bound to apply his collateral securities before enforcing his direct remedies against the debtor. 1 Story, Eq. Jur. § 640; Lewis v. United States, 92 U. S. 618, 23 L. Ed. 513. Then on what principle can we hold that because the debtor becomes insolvent the contract with his creditor is changed, and that the creditor cannot, under those circumstances, enforce his direct claim against the debtor until he has realized on his securities? Is the rule capable of such inversion? I cannot see any reason in the proposition. I do not see why, in the absence of intervention by positive or statutory law, the engagements of parties should be varied." Per Gray, J., in People v. Remington & Sons, 121 N. Y. 328, 24 N. E. 793, 8 L. R. A. 458 (1890).

The United States bankruptcy law (Act July 1, 1898, c. 541, § 57h, 30 Stat. 560 [U. S. Comp. St. 1901, p. 3443]) provides that collateral securities shall be

HART v. HIATT et al.

(Court of Appeals of Indian Territory, 1899. 2 Ind. T. 245, 48 S. W. 1058.)

Action by Hart against W. T. Hiatt and others upon a promissory note made by them as partners. An attachment was issued, and property of the firm, consisting of agricultural implements, cows, heifers, calves, horses, colts, crop of oats, and the crop of growing wheat on 873 acres, was seized. The several partners claimed their statutory exemption out of the property thus attached. The case was referred to a special commissioner, who found as a matter of law that when partnership property is levied upon under an attachment the defendant in the attachment has not the right to claim his exemptions, whether the debt sued upon be one against the partnership or against the individual sued. To this finding the defendants excepted, which exception the trial court sustained. Plaintiff appealed.

TOWNSEND, J. * * * The next important question in this case, in our view of it, is raised by the ruling of the court in sustaining appellees' exception to the fourth finding of the commissioner. Can a partner have exemption out of partnership assets when the same is levied upon under legal process? A learned author, after discussing this question and the decisions of different courts, says: "But it will not be necessary to enlarge this discussion, first, because the subject has been gone over in the preceding subdivisions; and, second, because the courts have, by a very decided weight of authority settled the doctrine that those statutes do not contemplate the setting apart of exempt property out of partnership assets." Thomp. Homest. & Exemp. § 194. Another author says: "There are cases recognizing the exemption of partnership property, but ordinarily the statutes favor the individual representing a family, or the follower of an avocation; and the general rule is that partnership property is not exempt when not expressly made so. * * * The question has been much discussed, but it seems clear that a partner cannot claim as exempt to him property which he does not own. The firm is an artificial person, of which he is a part; but its property is not his. Therefore there must be statutory authorization before he can rightfully claim any portion of the partnership property, other than such authorization, as that which exempts certain property to individual debtor owners." Wap. Homest. p. 904. "It does not appear that, at the

valued, and the secured creditor shall receive a dividend only upon the unpaid balance.

"The statute only requires the property to be renounced, sold, or valued when it is the property of the bankrupt. If the goods or estate of any third persons have been pledged for the bankrupt's debt, equity does not require that the general creditors shall have the advantage of the security. * * * This rule applies to partnerships when the estate of one partner has been pledged or mortgaged for a debt of the firm." Per Lowell, J., in Re Holbrook, Fed. Cas. No. 6,588.

time of the attachment, the plaintiffs had dissolved partnership, or had divided their joint property, or had had a general settlement and winding up of their business. We agree with the plaintiffs' counsel that the statute is humane and beneficial in its purpose and operation, and fairly entitled to as liberal a construction as can be given it, consistently with its true and just interpretation. There are many difficulties, however, in the way of applying it to the case of copartners and joint owners, and these difficulties we find to be insuperable. Property purchased with the joint funds of the firm, and constituting a portion of its capital, must necessarily be subject to all the incidents of partnership property. On the decease of one member of the firm, it would go to the surviving member, and he would have a right to hold it, to be used in settling the affairs of the concern, and paying its debts. In the case of numerous partners can it be said that each would have the right to claim, as exempt from attachment for the joint debts $100 worth of tools and implements, and another $100 worth of materials and stock; or is the whole firm to be considered as one debtor only? Does the exempted property in that case belong to the partners jointly, or does each take a separate share? It appears to us that the statute is intended to apply only to the case of a single and individual debtor. The exemption which it gives is strictly personal. The statute speaks in the singular number throughout, unless possibly the clause as to fishermen (Gen. St. c. 133, § 32, cl. 9) be an exception. Its apparent object is to secure to the debtor the means of supporting himself and his family, by following his trade or handicraft with tools belonging to himself. It also provides that his family are to be secured in the enjoyment of certain indispensable comforts and necessaries, out of his property. But property belonging to the firm cannot be said to belong to either partner as his separate property. He has no exclusive interest in it. It belongs as much to his partner as it does to him, and cannot in whole or in part be appropriated (so long as it remains undivided) to the benefit of his family. It may be wholly contingent and uncertain whether any of it will belong to him on the winding up of the business and the settlement of his account with the firm. The exemption, in our opinion, is several, and not joint. It applies to the debtor in the singular number, and is personal and individual only." Rond v. Kimball, 101 Mass. 106. In Thurlow v. Warren, 82 Me. 164, 19 Atl. 158, 17 Am. St. Rep. 472, the agreed state of facts was as follows: "It appeared that, at the time the plaintiffs were adjudged insolvents, they were the sole owners, in their copartnership capacity, of a pair of oxen; that they were the owners of no other oxen, either as copartners or as individuals; and that they subsequently replevied them from their assignee, the defendant, to whom the oxen had been delivered by the messenger of the court of insolvency. It was agreed that, if judgment should be for the plaintiffs, they were to recover nominal damages, with full costs; and, if for defendant, he was to have judg-

ment for $200, with interest and full costs." The court say that, "although in some jurisdictions the contrary view is taken, still the great weight of deliberate and well-considered cases hold that individual, and not partnership, property is exempt"—citing Pond v. Kimball, supra; Bonsall v. Comly, 44 Pa. 442; Guptil v. McFee, 9 Kan. 30; In re Handlin, 3 Dill. (U. S.) 290, Fed. Cas. No. 6,018. * * *

We think the appeal was proper, but that the judgment of the court below in sustaining the exceptions to the findings of the commissioner, and overruling the motion of appellant to quash the writs of supersedeas issued by the clerk of the court, was erroneous, and the same is hereby reversed, and the case remanded for further proceedings.

Ex parte SILLITOE. Ex parte HUNTER. In re GOODCHILDS & CO.

(In Chancery, before Lord Eldon, Ch., 1824. 1 Glyn & J. 374.)

John Goodchild, the elder, John Jackson, William Jackson, John Goodchild, the younger, James Jackson, and Thomas Jones, carried on the business of bankers at Bishop Wearmouth under the firm of Goodchilds, Jackson & Co., and in London under the firm of Jackson, Goodchilds & Co. That branch of the banking business which was carried on in London was conducted by John and William Jackson, the partners resident in London. John and William Jackson also carried on the business of ironmongers in London, under the firm of John & William Jackson, on their separate account. * * *

A debt arose from the banking firm to the ironmongery firm for money procured for the benefit of the former firm on the credit of the indorsement of the latter firm. All the partners were adjudged bankrupts. Proof was tendered against the assets of the banking firm for the foregoing debt on behalf of the ironmongery firm. The proof was rejected.

This was an appeal from a decision of his honor, the Vice Chancellor, who was of opinion that no substantial distinction could be made between a loan of money or sale of goods by a minor partnership to the aggregate firm, and that this case came within the principle under which proof has been made by smaller firms, and by an order had directed that such sum of £8,222 should be proved against the estate of Goodchilds, Jackson & Co. * * *

The Lord Chancellor. It appears to me to be necessary in deciding this case to be well informed of the principle upon which the question turns, and the extent to which the decisions are to be applied, and it is of the utmost moment that the uniformity of the principle to be applied here should be carefully preserved. We all know, who have had occasion to practice in this court since the year 1796,

that nothing has been more perplexing than the application of this very principle, and, if there is anything in this case that might bring into question what has been considered as settled law, it is of the last importance that it should be reasoned and stated at large. The rule of the court upon this point is founded upon principles so clear that it would perhaps have been better that it should never have been departed from; but it has been departed from, and I feel no inclination to diminish or add to the exceptions. The rule is that a partner in a firm against which a commission of bankruptcy issues shall not prove in competition with the creditors of the firm, who are in fact his own creditors—shall not take part of the fund to the prejudice of those who are not only creditors of the partnership, but of himself. To that rule there is an exception, manifestly founded in justice, and that is, where a partner becomes a creditor in respect of the fraudulent conversion of his separate estate to the use of the partnership (an exception established in Ex parte Kendal, 1 Rose, 71, and other cases). In this commercial country it has become of great importance to know what is to be done in cases where the same individual is to be considered as standing in many distinct characters as member of several firms. If you look at the old law as to bills of exchange, you will find that in older times it was found infinitely difficult to deal with paper to which a man was party in more characters than one. Now, to meet the more complicated nature of commercial relations, we say that a man may be half a dozen men for the purpose of binding himself and benefiting others, and for that purpose may put his name upon bills in different characters, and may be a member of many partnership houses. These various relations originally came upon the court with surprise, and presented great difficulties. I well remember the Case of Shakeshaft, Stirrup, and Salisbury, cited in Ex parte St. Barbe, 11 Ves. 414, stated 6 Ves. 123, 743, 747. There were four or five persons in a partnership. Some of them carried on business in Liverpool, some in other places, and the credulous world took it for granted they were different concerns, though they were in fact only so many wheels of one machine. Another relaxation of the rule was therefore admitted—that, where there is a demand arising from a dealing by the partnership in a distinct trade, proof might be admitted; but then the question, what is a dealing in a distinct trade? is always to be looked at with great care. I apprehend that the principle does not apply more to two persons, who happen to be constituent members of a partnership of six, than to one or each of the six, if one or each was a distinct trader. I take it to be quite clear that if an individual partner has nothing more to say than this, that he has lent £100 to his partnership, the strict rule immediately applies to him, and shuts him out from the benefit of proof. If it were sufficient to state that the partner would not have lent the £100 but as a separate trader, the rule is at an end. We are not, therefore, merely to consider the ques-

tion whether John and William Jackson were partners as ironmongers, but whether this is to be considered a transaction between trade and trade; and in looking at the circumstances with a view to that question great care is necessary lest we establish a principle which might in its consequences be the destruction of the rule; and if it be supposed that Mr. Goodchild, or any individual of the six, had been a separate trader, coal dealer or corn dealer, and had with his separate moneys retired a bill discounted at the Bank of England, is it to be said that, because he is a separate trader, therefore the retiring of that bill is to make him a creditor to prove against the creditors of the partnership? And if that would not entitle the individual to prove, is there any distinction between the case of one separate trader and the case of two individuals who are separate traders in partnership? It is true, you must look at the whole series of transactions; but if Mr Goodchild for 10 years had been advancing money to his firm, till he had advanced £5,000, if you please, and that all the members of the firm had considered him as a creditor, and in their partnership books he had stated the partnership to be debtor to him, still the same principle that would not permit him to prove the £100 would apply to the £5,000. The question, therefore, to be decided here is: What is the principle upon which it can be said that the rule of law is to be relaxed in respect of the dealings of these two partners, because they were ironmongers, not dealing in the trade of ironmongers, not dealing in their separate articles, but dealing for the convenience of the general partnership, by advancing money to retire bills discounted by the Bank of England? Where is the distinction in this case which can be safely drawn, preserving all the decisions, to prevent the application of the general rule of law? I think it will be found, by reference to the original record of the cases that have been cited, that in those petitions the consideration for which the demand accrued is stated at length.

January 24. On this day the Lord Chancellor stated that he had carefully examined all the cases relating to this question of proof by partners as separate traders, in competition with their joint creditors, and that they were all cases in which the articles of one trade had been furnished to another trade; that there was no case in which the exception had been allowed where money had been advanced to the partnership by one or more of the partners; and that his opinion was the proof could not be maintained.

The order of the Vice Chancellor was discharged.

In re BUCKHAUSE.

(United States District Court for Massachusetts, 1874. 2 Lowell, 331, 10 Nat. Bankr. Rep. 206, Fed. Cas. No. 2,086.)

LOWELL, District Judge. * * * I understand that the firm of Buckhause & Gough, the bankrupts, were, at the time of their bankruptcy, indebted to the firm of Gough & Flynn in a certain sum for goods sold and delivered; and the question is whether that sum can be proved as a debt. Gough was a member of both firms, but Flynn was not a member of the bankrupt firm, and he offers this proof as the solvent or remaining partner of his late firm, having the right to wind up its affairs.

It has for a long time been the law of England that proof may be made by one firm against the other in such a case. The firms are regarded as distinct legal entities, capable of contracting with each other in equity. Story, Partn. 394; Lindl. Partn. p. 996; Ex parte Thompson, 3 Deac. & C. 612.

The English cases have gone beyond this, and have admitted contribution between the joint and separate estates, whenever there has been a distinct trade carried on, and the contract or dealing has been between "trade and trade," as they say, though the partners may have been the same in both firms, or though one firm may have included the other. The Massachusetts courts refuse to follow these last decisions, or to permit any proof between a firm and its members; but no court has denied the right of proof when the two firms had one or more distinct partners. In such a case a debt would exist which, to be sure, could not be recovered at law, for a technical reason. Bosanquet v. Wray, 6 Taunton, 597; Story, Eq. § 679. But I apprehend the better opinion to be that such a debt can be recovered in equity, without going into a general settlement of the accounts of both firms. Story, Eq. § 680; Hayes v. Bement, 3 Sandf. (N. Y.) 394; Calvit v. Markham, 3 How. (Miss.) 343. A learned author has expressed a doubt whether there would be a remedy even in equity. He says: "In Bosanquet v. Wray, the court seem to have thought that in such a case there might be a remedy in equity. It is not, however, easy to see how such a remedy could be worked out, except as against the common partner by a dissolution of the claimant partnership. The Court of Chancery does not assume jurisdiction simply to compel payment of a debt, where there is no lien or charge to be enforced; nor, except in cases within its peculiar jurisdiction over trusts and the like, does it give relief, unless there is, or at some time has been, a legal right." Dix. Partn. 268. But Story, at section 680, says: "Courts of equity, in such cases, look behind the forms of the transactions to their substance, and treat the different firms, for the purposes of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies." It cannot be denied that, in sub-

stance, a debt due from A. & B. to A. & D. is a very different thing from a mere overdraft by A. from funds of A. & B. To refuse to notice the distinction is to disregard the credit of D. altogether. Whether there be a remedy in equity or not, while the firms remain solvent, it seems clear that there is a debt which equity can recognize, and which, in bankruptcy, ought to be entitled to its share of dividends, in justice to the creditors of the creditor firm. Indeed, the right to sue at law has been granted by statute in one state. Adams, Eq. (5th Am. Ed.) 240, note 1, citing the laws and decisions in Pennsylvania. I have often decided that equitable debts may be proved under our bankruptcy act, and I am not aware that a contrary decision has ever been made. Holding this to be a debt in equity, and finding the decisions in bankruptcy in favor of allowing its proof, I admit it, though without any intimation that, as between one partner, or any number of partners, and the others, where there is no firm with a foreign member, the Massachusetts cases may not express the true doctrine of this country. Debt admitted to proof.

McELROY v. ALLFREE.

(Supreme Court of Iowa, 1906. 131 Iowa, 518, 108 N. W. 119.)

This is a proceeding in probate for the allowance of a claim against the estate of George D. Wood, deceased. Defendant answered by a general denial. The trial court allowed the claim in full, and defendant appeals.

Deemer, J. George D. Wood before his death was the cashier of and had the exclusive management of what was known as the Bank of Colfax, a copartnership composed of George D. Wood and Alexander Wood, engaged in the banking business at the town of Colfax. Plaintiff is the receiver of the copartnership, and defendant, the administrator of George D. Wood's estate. It is claimed that George D. Wood, while acting as cashier and managing officer of the partnership, which we shall hereafter call the bank, wrongfully, fraudulently, carelessly, and negligently, without the consent of his partner, and in excess of his authority, withdrew from said bank more than $100,000 in money, which was used by him and one Fellows in grain speculation and converted to his and their own use; that notes for the amount or a part thereof were taken from Fellows who was then as now insolvent, which was well known to the cashier, and that by reason of said wrong, fraud, and conversion, plaintiff is entitled to have the amount withdrawn established as a claim against decedent's estate. * * *

George D. Wood, in addition to being liable to his individual creditors, was also liable to the creditors of the bank, and if this were a case where a receiver was seeking to establish the rights of firm cred-

itors against assets in the hands of the administrator of George D. Wood's estate, we should have one for application of the doctrine of marshaling assets. But that is not the situation here. Were the bank a going concern and Geo. D. Wood alive, he, Wood, would personally owe the amount of his abstractions therefrom. This would not be a partnership, but an individual, liability although indirectly partnership creditors would profit therefrom. It is the liability of the debtor that we should look to in order to determine whether or not the doctrine of marshaling applies. In the case given by way of illustration, Wood's liability would be clearly individual and not because of his membership in the banking firm. The fact that Wood is dead and that the bank is in the hands of a receiver does not change this rule, especially where fraud is established, as in this case. Here the recovery is against Wood or his estate because of his personal and individual liability for fraud and the doctrine of marshaling does not apply.

Counsel for defendant have cited a number of cases in support of their contention, but none of them go to the extent claimed. Indeed they support the rule here announced. It may be that if the bank, in good faith, had loaned Geo. D. Wood the amount of money which he fraudulently abstracted, the rule contended for would apply. But that is not the situation here. The testimony plainly shows that the money was not only negligently and carelessly, but fraudulently, taken from the bank. In such cases no court of respectability has held that the doctrine of marshaling applies. On the contrary, beginning with the declaration of Lord Thurlow in Ex parte Lodge, 1 Ves. Jr. 166, and of Lord Eldon in Ex parte Harris, 1 Rose, 129, and ending with the latest authorities and text-writers upon the subject, it is held that if a managing partner fraudulently abstracts money from the firm, the firm or its representative may share with his individual creditors in his estate and its assets, and in competition with them. Bates on Partnership, vol. 2 (1st Ed.) § 839. And it is not necessary to show that the individual private estate had been augmented by the transaction. Indeed some of the cases go to the full extent of holding that, even if the liability be contractual, the doctrine of marshaling does not apply. Bird v. Bird, 77 Me. 499, 1 Atl. 455. We need not go to that extent in the present case. It is enough for us to hold to the general rule that when one member of a firm fraudulently abstracts some of its assets a representative of that firm may share pari passu with the individual creditors of the delinquent member. Indeed there may be cases where they might, under the doctrine of constructive trust, take all.

We have gone over the record with care, and find no error. The judgment is therefore affirmed.

WALTER et al. v. HERMAN et al.

(Court of Appeals of Kentucky, 1901. 110 Ky. 800, 62 S. W. 857.)

WHITE, J. On December 5, 1898, the appellee Martin Herman obtained an attachment against William J. Wilmer and Berry Wilmer, late partners doing business as Wilmer Bros. On this attachment two insurance companies were served as garnishees. On December 7, 1898, the appellant the Pease Company obtained an attachment against William J. Wilmer, doing business as W. J. Wilmer & Co., under which the same two insurance companies were served as garnishees. By agreement the insurance companies paid into court $1,440 in full of their indebtedness to W. J. Wilmer & Co. for loss by fire of a stock of goods. In the action by Herman the appellant Walter filed a petition to be made a party, alleging that the firm of W. J. Wilmer & Co. was composed of W. J. Wilmer and appellant Arton Walter, Jr., and that as such partners they suffered the loss by fire, and that firm was entitled to the benefit of the proceeds paid into court. He also pleaded that the firm of W. J. Wilmer & Co., as thus composed, was indebted to the Pease Company the claim sued on by it, as well as a claim to himself individually, and had no assets, outside the insurance proceeds, save $10 or $12 in accounts. Appellant then asked that the proceeds of the insurance be paid on the partnership debts, first to the Pease Company debt, and next to himself as an individual creditor. An issue was presented as to whether Walter was a member of the firm of W. J. Wilmer & Co., and upon trial before a jury it was determined he was, and so adjudged by the court. Subsequently the court rendered judgment that Walter's claim of $356.60 was valid against the firm of W. J. Wilmer & Co. Upon reasons and motion to set aside the two above judgments, the court declined to do so, and held that the property ($1,440) was voluntarily in court, as neither the attachment of Herman nor the Pease Company reached it, as one was against W. J. and Ben Wilmer, partners as Wilmer Bros., and the other against W. J. Wilmer as W. J. Wilmer & Co. However, the court declined to direct its receiver to pay the fund to Walter on his debt adjudged to him, or to the Pease Company on his written order. After further pleading as to priority of the claims of Herman over the Pease Company, the case was submitted, and the court adjudged that that of Herman was superior, and directed the payment to him of his claim in full, and directed the remainder to be paid to the Pease Company. The latter judgment, from which this appeal is prosecuted, was rendered in January, 1900, the former judgment having been rendered prior to May, 1899.

It is clear from the record that the Pease Company was a creditor of the firm of W. J. Wilmer & Co., composed of Wilmer and Walter; and as such firm creditors, outside of any question of priority of attachment, that company is entitled to be first paid out of the insurance

money paid into court that was the sole assets of that firm, because appellee Herman was not a firm creditor, but was a creditor of an entirely different firm of Wilmer Bros., composed of W. J. and Ben Wilmer. We are also of opinion that the judgment on the verdict of the jury as to whether appellant Walter was a member of the firm is conclusive of that question, as is also the judgment in Walter's favor for his debt of $356.60 as against the firm. From neither of these judgments have appeals been prosecuted, and they therefore stand unquestioned. The question, then, presented is as to the rights of Walter, to whom the firm of which he was a member owed a debt, and Herman, an individual creditor of Wilmer. The rule of priorities is thus stated by Mr. Parsons (section 402 of his work on Partnership): "While solvent partners cannot prove against the joint fund to the prejudice of joint creditors, because they are liable to those creditors, they may prove against the joint fund, in competition with the several creditors, to whom they are liable. Indeed, their rights are prior to those of the several creditors, for those creditors can have the right of their debtor to the joint fund only after all claims upon it are satisfied, and among these the claims of the other partners. * * * It follows, therefore, that the several creditors of each one will be postponed, so far as the joint assets go, not only to the joint creditors, but to the claims of the co-adventurers for balances due from their companies arising out of the adventure." This well-settled principle of partnership is decisive of the right of Walter to the sum of $356.60, adjudged to him prior to any claim of appellee Herman, which the trial court refused. We are of opinion that the judgment appealed from is erroneous, and it will be reversed, and cause remanded for judgment directing the payment out of the fund in court—the debt due the Pease Company first; then the debt of Walter; and, if any remain, the share of Wilmer, upon settlement of the partnership, to appellee Herman; and for proceedings consistent herewith.

Ex parte TOPPING et al.

(In Chancery, before Lord Cranworth, L. C., 1865. 4 De Gex, J. & S. 551.)

This was the appeal of Charles Topping and others from a decision of Mr. Registrar Winslow, sitting as a Commissioner in Bankruptcy, whereby he rejected a proof for £404. 11s. 6d., tendered by the appellant Charles Topping on behalf of the separate creditors of the bankrupt George Levey, against the separate estate of the bankrupt Charles Robson.

The proof was tendered in respect of a debt due to the bankrupt George Levey from the bankrupt Charles Robson, to whom, in the year 1834, the bankrupt George Levey had, out of his own private moneys, made an advance to enable the bankrupt Charles Robson to

increase his business capital. * * * The bankrupts were adjudged bankrupts as copartners in January, 1864, and the appellant Charles Topping was one of the assignees. The other appellants were separate creditors of the bankrupt George Levey.

It was admitted at the bar that the separate estate of the bankrupt Charles Robson would be insolvent, whether the proof in question was admitted or not, and that there could be nothing coming from that estate for the joint creditors. * * *

The Lord Chancellor. The right which, under an adjudication of bankruptcy against two partners, one of them, who is a creditor of his copartner, has to prove against the separate estate of his debtor, where it is clear that, whether such proof be admitted or not, there will be no surplus of the separate estate of the debtor available for the purposes of the joint creditors, must be considered by the light of certain artificial rules which are derived from the principles of the Court of Chancery as to marshaling, and which were embodied for the first time in an order made in bankruptcy by Lord Loughborough in the year 1794. By the effect of that order separate accounts are kept of the joint estate and of the separate estate of each partner, and if there be any amount of joint estate the joint creditors are not admitted to prove against the separate estate until the separate creditors are paid, and then they are to receive from the separate estate the surplus only which remains.

The consequence is that it has been held that one partner cannot prove against his copartner, because, in ordinary cases, that proof would diminish the surplus of the estate of the debtor partner, and thereby the creditor partner, if admitted to prove, would come into competition with his own creditors, namely, the joint creditors, and detract to the extent of the proof from the benefit which they would derive from the separate estate. Therefore it has been laid down as a general rule that a partner cannot be permitted to prove against the estate of his copartner until the joint debts are satisfied.

The question here is whether, under the circumstances of this case, that rule so expressed should be confined within the limits of the purpose by reason of which it was framed, or whether it should be carried out to the letter when the reason or purpose ceases to have any application. * * *

But the case before me is a different kind, and I regard it as consisting entirely of these circumstances, to which I mean to limit my decision, namely, that the debt sought to be proved by the partner against his copartner is a debt arising from an undisputed contract apart from the copartnership, and which was in existence at the time of the adjudication in bankruptcy. I also limit my decision to a case where, as in this case, by no possibility can there be any surplus of the partner's estate against which proof is proposed to be made, whether the proof be admitted or not.

Limiting, then, my decision to a case so circumstanced, I think it reasonable and just that the rule should not be extended beyond the reason which introduced it and was the cause of its being laid down; and, if it be true that the estate of the partner against which the proof is tendered cannot by possibility yield a surplus, it would be unreasonable and unjust to refuse the opportunity of proof being made. * * *

In my judgment, therefore, the proof by one partner against the separate estate of another partner ought in this case to be admitted. But, inasmuch as contingencies may arise which may render the separate estate of the partner larger than is now contemplated, there should be added to the order a declaration that the proof must be subject to be expunged and the dividend to be refunded in the case of any such surplus of the estate of that partner occurring for the benefit of the joint creditors. * * * [1]

MURRAY v. MURRAY et al.

(Court of Chancery of New York, 1821. 5 Johns. Ch. 60.)

The plaintiff, John V. Murray, and Robert Murray, George W. Murray, and John R. Wheaton, were partners under the firm name of Robert Murray & Co. The partnership failed while the plaintiff was in England on firm business. George W. Murray and Wheaton having gone to Europe, leaving Robert Murray the only partner in this country, the latter, by virtue of a power of attorney from his copartners, executed several assignments of the firm property to John B. Murray and Clark for the benefit of certain creditors. Afterwards all the members of the partnership, except the plaintiff, were declared bankrupt under the United States bankruptcy law and received their discharge. The plaintiff, having returned to the United States and never having been adjudged bankrupt in this country, filed this bill, charging that John B. Murray and Clark had, by virtue of the assignment to them, received large sums of money, more than sufficient to satisfy the debts directed to be paid, and that they had in their hands a large balance belonging to the partnership, which plaintiff prayed might be turned over to him, as the remaining solvent partner. This cause was brought to a hearing for the purpose of obtaining the opinion of the court whether plaintiff was entitled to an account from the assignees of the firm and to the payment of the balance in their hands. If the plaintiff was not so entitled, the bill was to be dismissed.

KENT, Ch. The question in this case, between the plaintiff and the assignees of his bankrupt partner, relates to the control and distribution of the partnership fund. The plaintiff, in a particular manner,

[1] It seems that the United States bankruptcy law of 1898 (Act July 1, 1898, c. 541, § 5g, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424]) would permit the proof of the claim of the partnership estate against the individual estates, and vice versa.

claims the balance reported to be due from the estate of John I. Clark, deceased, to the house of Robert Murray & Co., and insists that he is entitled, in preference to the assignees, to distribute that balance, and to disregard the settlement which was made by those assignees with the executor of Clark. * * *

It is admitted, in all the cases, that the assignees of a bankrupt partner and the remaining solvent partner are tenants in common in respect to the partnership funds, and, like all tenants in common, one party cannot call the joint property out of the hands of the other. There is no such case. They are entitled equally to the possession in law. This was expressly held in Smith v. Stokes, 1 East, 363. Trover will not lie for one against the other. It has also been held that the solvent partner and the assignees of the bankrupt cannot sue alone, and that they must unite in actions at law. Ashhurst, J., in Graham v. Robertson, 2 Term, 282; Eckhardt v. Wilson, 8 Term, 140. What right, then, has the solvent partner to come into this court, to call the entire joint funds out of the possession of the assignees, who are his co-tenants in common, and as such have an equal control over the joint funds? There is no case giving to either party the absolute, exclusive possession and distribution of the entire effects. Neither party is strictly entitled, as against the other, to anything more than his share of the surplus after the partnership debts are paid. Field v. Taylor, 4 Vesey, 396.

In this case there is no justice or equity in the pretension of the plaintiff. He admits that the partnership debts greatly exceed the partnership funds, and that there cannot be any surplus coming to either party. His sole object, then, is to have the partnership funds, which have been or may be under the control of the assignees, pass into his hands for distribution, instead of having them distributed by the assignees; and he denies all right in the assignees to touch or distribute any of the partnership funds and wishes to vacate all that they have done. But it appears that a great majority in interest of the joint creditors, and who have partnership debts due them to nearly $500,000, have come in and proved their debts under the separate commission in the case of Robert Murray. These include almost all the debts, except such as were provided for under the assignments to J. B. Murray and Clark. It also appears that the assignees, after having by suit obtained a liquidation of the balance due from the estate of Clark, and bestowed great care and efforts towards the recovery and security of that debt, settled it upon terms which they deemed prudent and just, under all the circumstances. This settlement and consequent discharge of the estate of Clark was in February, 1810; and in October following, due public notice having been given to the creditors, several of them appeared before the commissioners of bankrupts and ratified that settlement. If there was anything wrong in the settlement, it was for the creditors to disturb it; and it would be most unreasonable to permit the plaintiff to set aside all that had been done by the assignees

under such a sanction from the creditors, merely for the purpose of making his own distribution. There is no charge of misconduct in the assignees. The whole bill is a denial of their competency to act, though every case on the subject admits that assignees of a bankrupt partner are tenants in common with the solvent partner. If the pretensions of either party to an exclusive distribution of the partnership funds were to be examined upon principles of policy and equity, the assignees would have the better pretension, in the view of this court, because the solvent partner has it in his power to give preferences and defeat the equality and equity of the bankrupt system. Assignees, on the other hand, are bound to make a ratable distribution of the assets; and, being trustees under the control of this court, there is no good reason why their equal rights at law as tenants in common should suffer diminution here. They are tenants in common, but with particular equities in them, as Lord Eldon observed, "vastly beyond what tenants in common have where no bankruptcy has occurred"; and their claim to the distribution of the partnership fund has been encouraged and strengthened by the decisions in chancery. This will appear by a review of some of the leading chancery cases. * * *

Upon this review of the cases I am not able to perceive any colorable reason for the pretension set up by the plaintiff to the exclusive distribution of the partnership funds. There would be much more ground, upon the established doctrines of equity, for an exclusive right of distribution on the part of the assignees, since under their commission the court is in the practice of directing an account of the joint estate to be taken and a distribution of that estate ratably among the joint creditors. The most that can be said is that the solvent partner upon the dissolution of the partnership by bankruptcy, being a tenant in common, may retain and distribute the funds in his possession, and may, as was held in Fox v. Hanbury, Cowp. 445, sell those partnership effects for a valuable consideration and without fraud. They cannot be called out of his possession by his co-tenants, the assignees, unless under the direction of this court, on a bill filed by them for contribution, or, perhaps, where an account of the joint fund is directed to be taken in bankruptcy. But, on the other hand, there is no foundation in law or equity for the solvent partner to call to account, either the partnership debtors who have bona fide settled with the assignees, or the assignees themselves, for the funds in their possession. They hold those funds by an equal title in law with him as tenants in common, and by a superior equitable title as trustees, charged with the payment of both the joint and separate debts.

I shall accordingly declare that the plaintiff has no right or title in law or equity to call the assignees to account for the partnership funds, which have been or are now in their possession as such assignees, in order to obtain by decree the possession of those funds for distribution among the creditors of Robert Murray & Co., inasmuch as those assignees have an equal right and title in law as tenants in common

with the plaintiff, and a better right in equity, to the possession of those funds for the same purpose of distribution. * * * And I shall direct the original bill, and bill of revivor and supplement, to be dismissed, but without costs, considering the special circumstances of the case, and the importance of the points investigated and discussed.

Decree accordingly.[1]

FERN v. CUSHING et al.

(Supreme Judicial Court of Massachusetts, 1849. 4 Cush. 357.)

SHAW, C. J. This was a writ of scire facias against Daniel Cushing and Sewell G. Mack, as trustees. It appears, by the answers and the facts agreed, that suits were brought, first by Francis Vose, and second by the plaintiff, Fern, against Whitney & Blair and the present defendants as their trustees. The actions were continued in court some time, during which the defendants accepted an order, drawn on them by Whitney & Blair, to pay over to a third firm the balance of funds in their hands, subject to prior liens. This fact has no material bearing. The plaintiff's action, though commenced after that of Francis Vose, came to judgment first, and the plaintiff took out execution and placed it in the hands of an officer, who duly made demand upon the defendants for the funds in their hands, they having been charged as trustees, and execution awarded in usual form against the goods and effects of Whitney & Blair in their hands. Afterwards judgment was rendered in the action of Francis Vose, and execution also awarded against the goods and effects of Whitney & Blair in the hands of the defendants; Vose's being the first attachment. This execution was placed in the hands of an officer, and a demand made upon the defendants for the goods and effects of Whitney & Blair in their hands. This occurred on the 24th of March, 1847. On the morning of the same day the first publication was made of a notice issued by a messenger, upon a proceeding in insolvency, upon the application of Blair alone, after the dissolution of the partnership of Whitney & Blair. It appears that he did not set forth the insolvency of the firm, but only his own; and the warrant and other proceedings were conducted upon the principle of his several insolvency. The messenger under this warrant demanded the funds in the hands of the defendants. Afterwards the defendants paid over the whole balance of the funds in their hands.

[1] The United States bankruptcy act of 1898 (Act July 1, 1898, c. 541, § 5h, 30 Stat. 547 [U. S. Comp. St. 1901, p. 3424]), provides: "In the event of one or more but not all of the members of a partnership being adjudged bankrupt, the partnership property shall not be administered in bankruptcy, unless by consent of the partner or partners not adjudged bankrupt; but such partner or partners not adjudged bankrupt shall settle the partnership business as expeditiously as its nature will permit, and account for the interest of the partner or partners adjudged bankrupt."

Jones v. Newsom, 7 Biss. (U. S.) 321, Fed. Cas. No. 7,484 (1876), accord.

after deducting the amount which they were allowed by the court to retain for their costs and expenses as trustees, on the execution of Vose, as the first attaching creditor.

The ground on which the plaintiff seeks to charge these defendants as trustees, after they have paid over the entire fund on the execution of the previous attaching creditor, is this: That the plaintiff, by suing out his execution against Whitney & Blair and causing demand to be made of their effects in the hands of the defendants, had perfected his lien on the fund, so as to place it beyond the risk of being defeated and having his attachment dissolved by any proceedings in insolvency, but that Vose, though he recovered judgment and took out execution, did not have a demand made on the trustees on his execution until after the first publication of the notice of insolvency, and therefore that his attachment was thereby defeated, and let in the plaintiff as the first indefeasible lien on the fund.

This reasoning is plausible, but we think not sound, and not sufficient to give the plaintiff, as second attaching creditor, a priority over Vose, who was the first.

It is not necessary now to decide what act by an attaching creditor is a sufficient taking of the property in the hands of a trustee, so as to prevent a dissolution of the attachment by insolvent proceedings, whether it be the judgment, the issuing of execution, the delivery of such execution to an officer, or the demand by the officer upon the trustee. This decision stands on other grounds.

The insolvent proceedings were against Blair alone. The assignee under these proceedings had no right to take the partnership property, except the share and interest of the insolvent, after the payment and satisfaction of partnership debts. The assignment extended only to the interest of the insolvent partner in the property and effects of the partnership after the payment of partnership debts. Pierce v. Jackson, 6 Mass. 244; Allen v. Wells, 22 Pick. 450, 33 Am. Dec. 757; Dyer v. Clark, 5 Metc. 562, 39 Am. Dec. 697; Parker v. Phillips, 2 Cush. 175.

The insolvent proceedings, therefore, against Blair, did not affect the partnership property attached by Vose in the hands of the trustees, who were indebted to the firm only; and the messenger under these proceedings had no right to the property, and the trustees rightfully paid over the funds in their hands on Vose's execution as the prior attaching creditor. Nothing remained to satisfy the execution of the plaintiff.

Judgment for the defendants.

HALSEY v. NORTON.

(Supreme Court of Mississippi, 1871. 45 Miss. 703, 7 Am. Rep. 745.)

Action by Norton, as assignee in bankruptcy of H. F. Giren and D. A. Giren, as members of the firm of Giren, Brown & Co., against Halsey. Judgment below for plaintiff. Halsey appealed.

SIMRALL, J. It is urged for the plaintiff in error that the judgment ought to be reversed, because the assignee, Norton, ought to have united with him as coplaintiff the solvent partner. It was said by the Chief Baron in Taylor v. Fields, 4 Vesey, 396, "that the surplus of partnership effects is joint property, and that the interest of each partner is only his share of what remains after the partnership accounts are taken." The assignee takes precisely the position of the bankrupt as respects the joint property. That interest is transferred to him to be administered for the creditors. Bankruptcy does not divest the title of the solvent partner. It dissolves the copartnership, and constitutes the assignee and the solvent partner tenants in common or joint owners. To stand in a court of law, the plaintiff must have the entire legal right. If the title be held by several, all must join in the suit. Eckhard v. Wilson, 8 T. R. 140, and Murray v. Murray, 4 Johns. 70, are to the point that the assignee and the solvent partner must unite in a suit respecting the joint effects and choses in action. But it must be manifested that there is another person, not coplaintiff, who ought to, etc. This may be by plea in abatement, or by nonsuit, if proved on the trial (1 Chitty's Plead. 452, 453), or by demurrer, if it appears on the face of the declaration. The declaration is thus: "E. E. Norton, assignee, etc., of Henry F. Giren and Dickson A. Giren, as members of the firm of Giren, Brown & Co." It is not averred who composes the firm, except these two bankrupts, nor does it appear affirmatively that there were any other members. The copartnership name may be and often is purely artificial, not discovering who are its members. Proof was not made on the trial that any other person was a member, although objection was made by the defendant to the admission of evidence in truth of the account on that ground. If it was not apparent on the record that there was a solvent partner, if the defendant proposed to nonsuit the plaintiff or prevent his recovery, she ought to have proved the existence of such a partner. We do not think that the record presents the point made by the plaintiff in error, so that she can avail of it in this court.

Affirmed.

LOOMIS v. WALLBLOM et al.

(Supreme Court of Minnesota, 1905. 94 Minn. 392, 102 N. W. 1114, 69 L. R. A. 771.)

JAGGARD, J. On November 27, 1893, defendants, partners doing business as Wallblom & Thorsell, executed a deed of assignment under the state insolvency law, both as individuals and as partners, of all their unexempt property, which was filed in the district court of Ramsey county. The National Wall Paper Company filed and proved its claim in the assignment matter, but did not file a release, and received no dividend. In March, 1895, it brought an action against Charles Wallblom and John Thorsell, as copartners doing business as Wallblom & Thorsell, in the district court of Ramsey county, alleging in its complaint the sale of goods of the value of $254.77, and default in payment. There was no allegation that the goods were sold to the firm or purchased for partnership purposes. Default was made, and judgment entered on the 9th day of April, 1895, against "Charles Wallblom and John Thorsell, as copartners doing business as Wallblom & Thorsell, and each of them." On the 4th day of August, 1898, Charles Wallblom filed his individual petition in bankruptcy, and was on August 5th adjudged a bankrupt. The claim of the National Wall Paper Company was listed as follows: "National Wall Paper Co., Chicago, Ill. $254.77. Consideration, goods bought." On December 19, 1898, Charles Wallblom was discharged from all his debts. This appellant, as assignee of said judgment, thereafter brought this action to renew the judgment hereinbefore set forth. Respondent Wallblom answered, setting up his discharge in bankruptcy as a defense. The reply does not deny actual notice of the bankruptcy proceedings on the part of the National Wall Paper Company, but denies that notice was given to the partnership creditors. It does not appear that defendant John Thorsell was served or appeared in the proceeding. Upon the trial it was admitted that the copartnership of Wallblom & Thorsell ceased to do business in 1893, and that the partnership was dissolved so far as it could be done by the acts of the partners. The debt here sued upon was not paid or discharged. The court found that notice had been given to all creditors whose claims were scheduled, and ordered judgment in favor of Wallblom upon the merits. From an order denying plaintiff's motion for a new trial, this appeal was duly taken.

Appellant's assignments of error involve the determination of this question, namely: "Did the court err in holding as a proposition of law that the individual discharge in bankruptcy of Wallblom released him from the claim here sued upon?"

The answer to that question depends, in the first place, upon a construction of the bankruptcy act. The certificate of discharge recited that the bankrupt had conformed to all the requirements of law in

that behalf. The court thereby decreed that the bankrupt "be forever discharged from all his debts and claims which by said act were made provable against his estate, and which existed on the 4th day of August, 1898, on which day the petition for adjudication was filed by him, excepting such debts, if any, as are by said act excepted from the operation of a discharge in bankruptcy." There is no claim that the discharge was invalid by reason of any of the things mentioned in chapter 3, §§ 14 and 15, of the bankruptcy act of 1898 (Act July 1, 1898, c. 541, 30 Stat. 550 [U. S. Comp. St. 1901, pp. 3427, 3428]). The discharge did not purport to forever release the bankrupt from all his debts and liabilities, but only from all such "debts and claims" as were by said bankruptcy act "made provable against his estate." That the debt was one which might have been proved in bankruptcy proceedings against the estate of the individual partner is evident from the whole tenor of the law, and especially from chapters 1, 3, §§ 1, 4, 30 Stat. 544, 547 (U. S. Comp. 1901, pp. 3418, 3423), chapter 3, §§ 4, 5, of that law, 30 Stat. 547 (U. S. Comp. St. 1901, pp. 3423, 3424). See, also, section 16, 30 Stat. 550 (U. S. Comp. St. 1901, p. 3428). Indeed, subdivision "g" of said section 5 expressly provides that the court may "permit the proof of the claim against the individual estates and vice versa and may marshal the assets of the partnership estate and the individual estates so as to prevent preferences and secure the equitable distribution of the property of the several estates." The history and present status of this case differentiate it from any authority to which our attention has been called, or which a careful search has enabled us to find. Collier on Bankruptcy (5th Ed.) p. 74, § 5a. The partnership ceased to do business, and had been dissolved so far as the parties could dissolve it, in 1893. Moreover, in that year, by general assignment under the state insolvency law, the partners conveyed all their unexempt individual and firm assets to an assignee. The plaintiff has not made it appear that any such firm assets now exist. This court will not presume that they do. This case therefore does not involve any question of marshaling assets, nor of the right of the plaintiff against the firm assets or the other partner. Respondent alone appears to have been served with summons in this action. The question here presented to this court affects the judgment against him alone. It is also to be borne in mind that this is not an objection to the entry of a decree of discharge, but only to the right of the appellant to renew or extend this judgment. The entry of the judgment materially affected the nature of the claim on which it was based, so far as these proceedings are concerned. It might be that in certain contingencies this court would examine that judgment for the purpose of ascertaining what the original contract was. Such a proposition is, however, academical in this case. When the judgment was entered it became a lien on any unexempt real estate within the county where the judgment was docketed which belonged to the defendant and respondent Wallblom, and the creditor

became entitled to appropriate new rights and remedies against him in consequence. So far as this case involves that judgment, the original cause of action was merged therein. In McKittrick v. Cahoon, 89 Minn. 383, 95 N. W. 223, 62 L. R. A. 757, 99 Am. St. Rep. 606, this court held that where, by an order in bastardy proceedings, the putative father of a natural child was required to pay a monthly stipend for its support, and upon refusal a final money judgment was obtained for the total amount due, the rights of the person entitled to recover under the order of filiation were merged in the judgment, and the debt evidenced thereby was not excepted from the operation of the bankruptcy act of 1898 (section 17), although the claim on which the judgment was based, standing by itself, would not have been discharged.

Such a judgment as the one here sought to be extended, filed in the bankruptcy proceedings, might, under appropriate conditions, have been paid in full or in part by the application thereto of the whole or a proper part of the funds in the hands of the respondent's trustee in separate bankruptcy proceedings. Its full discharge as an individual liability on a firm debt may accordingly be had in bankruptcy proceedings. Jarecki Mfg. Co. v. McElwaine, 5 Am. Bankr. R. 751, 107 Fed. 249; Curtis v. Woodward, 58 Wis. 499, 17 N. W. 328, 46 Am. Rep. 647. Collier in his note to In re Freund, 1 Am. Bankr. R. p. 31, says: "Both on principle and by the weight of authority it would seem to be law that a discharge granted to one member of the firm releases him from all his provable debts and liabilities, both from those incurred individually and from those incurred as a member of the partnership. The few cases which held to the contrary under the former act seem to have been based upon a misconception of the extent of the rights of an assignee in the bankrupt's property, and as to the effect upon the firm of the bankruptcy of one member." In Re Meyers (D. C.) 96 Fed. 408, relied upon by appellant, upon an objection to discharge on the ground of fraud, there were independent and merely individual proceedings by the two partners. The petition asked for discharge of both individual and partnership debts. Brown, J., said (page 411): "No adjudication of the firm as a bankrupt is asked, nor could such an adjudication be made without formal application therefor, and the presence of both partners in the same proceedings. Where there are absolutely no firm assets, separate proceedings may be valid, and a discharge of each partner separately may possibly be had, because the firm debts are several as well as joint." Appellant also relies largely upon In re Mercur, 122 Fed. 389, 58 C. C. A. 472. That case involves an obviously different state of facts, and is in its reasoning not of necessity entirely inconsistent with the rule here applied.

In the early history of partnership law, the courts fell into the habit of speaking of a partnership as "a separate entity." The inaccuracy and impropriety of such nomenclature was so clearly and re-

peatedly demonstrated as to lead to its substantial abandonment. Recent decisions on the marshaling of assets under the present bankruptcy law have led to the undesirable resurrection of the phrase. Its misleading and ambiguous character is well illustrated by the subtleties of appellant's brief, and by his use of it as a justification for a fallacious conclusion derived by unwarranted deductions from a fiction of law. His argument commands admiration for its ingenuity and industry, but compels the conviction that its result would be a plain perversion of the letter and purposes of the bankruptcy law. The learned trial court properly held that the discharge in bankruptcy operated as a full defense. * * *

Order affirmed.[1]

[1] Corey v. Perry, 67 Me. 140, 24 Am. Rep. 15 (1877), contra.

CHAPTER IX.

TERMINATION OF THE PARTNERSHIP.

SECTION 1.—BY ACT OF THE PARTIES.

HENN v. WALSH.

(Vice Chancellor's Court of New York, 1833. 2 Ed. Ch. 129.)

Bill to dissolve the copartnership and for an account. An injunction had been granted. The defendant put in his answer. Cross-motions now came before the court—one, on the part of the complainant, for a receiver, and the other, by the defendant, to dissolve the injunction.

The copartnership had commenced on the 1st day of May, 1833, and was to continue for five years. By the agreement between the copartners an inventory was to be made at the end of two years, and if either was then dissatisfied he was to have liberty to dissolve the firm. The complainant had put into the concern the sum of $1,000 in cash, as his part of the capital, and the goods of the defendant, with fixtures belonging to him, were taken at a like sum, after allowing for debts which he owed. The charges of misconduct in the bill were met and denied by the answer.

McCoun, V. C. A partnership agreement, like any other, is binding upon the parties, and they must adhere to its terms. Neither partner is at liberty to recede from it against the will of the other without sufficient cause. Mere dissatisfaction by one partner will not justify him in filing a bill for a dissolution, where by their express agreement it is to continue for a definite term; and this court will not interfere to dissolve the contract upon such ground. Here there was a five-year partnership, with the privilege of dissolving it at the end of two years. The complainant has become dissatisfied; and he makes various charges in his bill, showing prima facie cause enough for a dissolution before the stipulated time. But his allegations are positively and fully denied in the answer. As the matter now stands the complainant's case fails, and he would not be entitled on the hearing to a decree for a dissolution—consequently not to an injunction or receiver in the meantime. If there be any breach of covenants by one partner, which in its consequences would be so important as to authorize the party complaining to call for a dissolution before the copartnership could be dissolved by efflux of time, the complainant may then have an

injunction. Gow, 135. There must be some actual abuse of the partnership property or of the rights of a copartner, and not a mere temptation to such abuse, which will induce this court to interfere. Glassington v. Thwaites, 1 S. & S. 124. * * *

The injunction must be dissolved, and the motion for a receiver denied.

SOLOMON v. KIRKWOOD et al.

(Supreme Court of Michigan, 1884. 55 Mich. 256, 21 N. W. 336.)

COOLEY, C. J. The plaintiffs, who are in the city of Chicago dealers in jewelry, seek to charge the defendants as partners upon a promissory note for $791.92, bearing date of November 9, 1882, and signed "Hollander & Kirkwood." The note was given by the defendant Hollander, but Kirkwood denies that any partnership existed between the defendants at the date of the note.

The evidence given on the trial tends to show that on July 6, 1882, Hollander & Kirkwood entered into a written agreement for a partnership for one year from the 1st day of the next ensuing month in the business of buying and selling jewelry, clocks, watches, etc., and in repairing clocks, watches, and jewelry, at Ishpeming, Mich. Business was begun under this agreement, and continued until the latter part of October, 1882, when Kirkwood, becoming dissatisfied, locked up the goods and excluded Hollander altogether from the business. He also caused notice to be given to all persons with whom the firm had had dealings that the partnership was dissolved, and had the following inserted in the local column of the paper published at Ishpeming: "The copartnership heretofore existing between Mr. C. H. Kirkwood and one Hollander, as jewelers, has ceased to exist; Mr. Kirkwood having purchased the interest of the latter." This was not signed by any one.

A few days later Hollander went to Chicago, and there, on November 9, 1882, he bought, in the name of Hollander & Kirkwood, of the plaintiffs goods in their line amounting to $791.92, and gave to the plaintiffs therefor the promissory note now in the suit. The note was made payable December 15, 1882, at a bank in Ishpeming. When the purchase was completed, Hollander took away the goods in his satchel. The plaintiffs had before had no dealings with Hollander & Kirkwood, but they had heard there was such a firm, and were not aware of its dissolution. They claim to have made the sale in good faith and in the belief that the firm was still in existence. On the other hand, Kirkwood claimed that Hollander and the plaintiffs had conspired together to defraud him by a pretended sale to the firm of goods which the plaintiffs knew Hollander intended to appropriate exclusively to himself; and he was allowed to prove declarations of Hol-

lander which, if admissible, would tend strongly to prove such a conspiracy.

The questions principally contested on the trial were, first, whether the acts of Kirkwood amounted to a dissolution of the partnership; second, whether sufficient notice of dissolution was given; and, third, whether there was any evidence to go to the jury of an understanding between Hollander and the plaintiffs to defraud Kirkwood. The trial judge, in submitting the case to the jury, instructed them: That Kirkwood, notwithstanding the written agreement, had a right to withdraw from the partnership at any time, leaving matters between him and Hollander to be adjusted between them amicably or in the courts; and for the purposes of this case it made no difference whether Kirkwood was right or wrong in bringing the partnership to an end. If wrong, he might be liable to Hollander in damages for the breach of his contract. Also, that when partners are dissatisfied, or they cannot get along together, and one partner withdraws, the partnership is then at an end as to the public and parties with whom the partnership deals, and neither partner can make contracts in the future to bind the partnership, provided the retiring partner gives the proper notice. Also, that if they should find from the evidence that there was trouble between Hollander and Kirkwood prior to the sale of the goods and the giving of the note, that Kirkwood informed Hollander in substance that he would have no more dealings with him as partner, that he took possession of all the goods and locked them up, and from that time they ceased to do business, then the partnership was dissolved. Further, that whether sufficient notice had been given of the dissolution was a question for the jury. Kirkwood was not bound to publish notice in any of the Chicago papers. He was only bound to give actual notice to such parties there as had dealt with the partnership. But Kirkwood was bound to use all fair means to publish as widely as possible the fact of a dissolution. Publication in a newspaper is one of the proper means of giving notice, but it is not absolutely essential; and on this branch of the case the question for the jury was whether Kirkwood gave such notice of the dissolution as under the circumstances was fair and reasonable. If he did, then he is not liable on the note; if he did not, he would still continue liable.

The judge also submitted to the jury the question of fraud in the sale of the goods. The jury returned a verdict for the defendants.

We think the judge committed no error in his instructions respecting the dissolution of the partnership. The rule on this subject is thus stated in an early New York case: The right of a partner to dissolve, it is said, "is a right inseparably incident to every partnership. There can be no such thing as an indissoluble partnership. Every partner has an indefeasible right to dissolve the partnership as to all future contracts by publishing his own volition to that effect; and after such publication the other members of the firm have no capacity to bind him by any contract. Even where partners covenant with each other

that the partnership shall continue seven years, either partner may dissolve it the next day, proclaiming his determination for that purpose; the only consequence being that he thereby subjects himself to a claim for damages for a breach of his covenant. The power given by one partner to another to make joint contracts for them both is not only a revocable power, but a man can do no act to divest himself of the capacity to revoke it." Skinner v. Dayton, 19 Johns. (N. Y.) 513, 538, 10 Am. Dec. 286. To the same effect are Mason v. Connell, 1 Whart. (Pa.) 381, and Slemmer's Appeal, 58 Pa. 155, 98 Am. Dec. 248. There may be cases in which equity would enjoin a dissolution for a time, when the circumstances were such as to make it specially injurious; but no question of equitable restraint arises here. When one partner becomes dissatisfied, there is commonly no legal policy to be subserved by compelling a continuance of the relation, and the fact that a contract will be broken by the dissolution is no argument against the right to dissolve. Most contracts may be broken at pleasure, subject, however, to responsibility in damages; and that responsibility would exist in breaking a contract of partnership as in other cases.

The instruction respecting notice was also correct. No court can determine for all cases what shall be sufficient notice and what shall not be. The question must necessarily be one of fact. * * *

But we think the judge erred in receiving evidence of Hollander's admissions or declarations tending to show fraudulent collusion between him and the plaintiffs. * * *

For this error there must be a new trial.

WALKER v. WHIPPLE.

(Supreme Court of Michigan, 1885. 58 Mich. 476, 25 N. E. 472.)

CHAMPLIN, J. In this case it is conceded that the copartnership entered into was not limited by the express agreement of the parties. It was therefore determinable, in the absence of fraud, at the will of either party. I do not agree that a limitation may be engrafted upon such a copartnership agreement by implication arising out of the business engaged in or the circumstances of the case. It may be said that it is generally understood that such contract relations are not formed, except with a view of engaging in some business which may require both time and capital to carry out the object for which the partnership was formed. It is nevertheless true that, unless the term for which the partnership is to continue is limited or fixed by the agreement, either party may, at his pleasure, dissolve the relation. This is elementary law. The defendant exercised his right, and the partnership was dissolved by his refusing to continue the business further in company with complainant. It does not concern us what his reasons or motives for doing so were. There were no existing engage-

ments of the firm that have interfered with the winding up of the partnership affairs. The whole matter between the partners was satisfactorily settled and adjusted by the decree appealed from by complainant, except a claim made by him, but which the court below disallowed, of prospective profits which complainant claims might have been realized, had the defendant not dissolved the partnership. The effect of allowing such claim would be to mulct the defendant in damages for doing what he had a legal right to do. I can find no warrant for the infliction of such penalty, and the results which would flow from the establishment of such doctrine would be injurious and far-reaching in their consequences. The farthest courts have gone in this direction occurs in cases where, by the terms of the partnership agreement, the time for its duration was limited, and before the expiration thereof one of the parties has dissolved the partnership; but in such cases there has been a breach of the contract, and the damages allowed are such as were the consequences of such breach.

I think the decree of the circuit court should be affirmed, with costs; and it is so ordered.[1]

SECTION 2.—BY OPERATION OF LAW.

PEARCE v. CHAMBERLAIN.

(In Chancery, at the Rolls, 1750. 2 Ves. Sr. 34.)

Articles between Robert Plummer and Daniel Pearce recited that Plummer had carried on the trade of a brewer at Hoddesdon, and had employed Pearce as servant and brewer, who having behaved himself faithfully, etc., and advancing a moiety of the value of the effects, he took him into partnership for 9 years, if Pearce should so long live; but, if he lived to the end of 9 years, the partnership should continue for any further term, not exceeding 21 years, as Pearce should desire, on giving notice, to continue it. It was provided that, notwithstanding the death of Plummer, it should be carried on by his representatives, and that, if Pearce should give that notice, he should not have it in his option to pay off the representatives of Plummer and carry it on himself, but with them.

This bill was by the widow and representatives of Pearce, against the representatives of Plummer, for an account, and for liberty to carry on the trade with the defendants.

[1] The opinion of Sherwood, J., holding that the agreement of the parties contemplated the continuation of the partnership through the threshing season, and therefore complainant was entitled to damages for the premature termination by defendant, is omitted.

For defendants was cited Godfrey v. Browning, March 7, 1742, where it was held that one copartner could not appoint a representative to carry on the trade after his decease, otherwise it might fall to the lot of an infant or person not at all fit to carry it on, and Baxter v. Burfield (B. R. Paschæ, 1746), 2 Stra. 1266, where it was held that a covenant to teach a boy his trade was rescinded by the death of the master, on the ground that it was a bond to serve personally, and that he was not bound to serve an executor.

For plaintiffs: It might be so where there is a general partnership, for then the death of one partner would determine it, but not so where a particular term has been agreed on; but if there was a case for that, it would not do here, because the provision for the representatives ought to be mutual, and shows they did not guard against an infant's carrying it on. No case is cited to show that all partnerships must continue or conclude on the living or death of the principals. On the death of the master the boy cannot become apprentice by a course of representation, as then it might be to the most ignorant person; but that is different from articles of copartnership in a beneficial trade, wherein a right has been purchased for a period of years. In the Case of Huddleston one party was a lunatic, who could not carry on the trade; yet Lord Talbot thought himself bound by the articles, and obliged the other to carry it on for the benefit of himself and the lunatic. Vide Sayer v. Bennet, 1 Cox, Ch. Ca. 107. Et per Lord Eldon, C., 2 Ves. & B. 302, 303.

Strange, M. R. Considering the whole frame and design of the articles, Pearce was only admitted in ease of Plummer, and for his skill in the trade, and, after that end was defeated by his death, it could not be the intent that any representative of him should have an opportunity to carry it on, as it might fall into such hands as could not be of service, and though it might come to the representatives of one, and not of the other, that is by express provision of the parties. Therefore on the articles the plaintiff is not entitled to a decree to carry on the partnership.

But, as a general question, the consequence with regard to trade weighs greatly with me. It would be of ill consequence in general to say that in articles of partnership in trade, where no provisions for the death of either is made, they might subsist for benefit of an executor who may not have skill therein. The plaintiff could be of no use in carrying on the partnership. Plummer wanted one whose knowledge he could confide in. The plaintiff, the administratrix, is entitled to one-third; the infant to the other two shares. Her intestate might be indebted, and the assets wanted to be distributed. It is improper, therefore, to suffer such a construction, unless the parties provide for it. I remember that case in Baxter v. Burfield, 2 Stra. 1266. It was an action against the surety in a bond conditioned for performance of the articles. The master, to whom the youth was bound, died. The executors thought they might have some benefit of

his time; and the view, therefore, was not to have him personally their servant, and to instruct him farther in the trade, but to put that benefit of the infant's service into their own pocket. The court, considering the inconvenience attending apprentices or trade in general, if infants were obliged to serve executors or administrators for remainder of the term, although not of the same trade with the infant, determined it for the defendant, that the action would not lie. I also remember Huddleston's Case, and am pretty certain (though not positive) that he was under a great dejection of mind, so that a commission was applied for; but before that question came before the court he had recovered himself, and was desirous to carry on the partnership. The court said these were accidents which could not be provided for; but that was no reason, when he had brought all his substance into trade, the other partner should say that a temporary disorder intervening should deprive him during life from going on with the business, and that he should put the whole benefit of the partnership into his pocket, without accounting for it. So that the court held he had not forfeited the benefit under the partnership, but should, notwithstanding that accident, be considered as partner. That case depended entirely on that circumstance; and there was a prospect of his recovery.[1]

[1] "As a partner cannot possibly continue to be a member of a firm after his death, any agreement with his executor, or other person having a beneficial interest in the share of the assets which belonged to him, for the continuation of the business thereafter with the surviving partner, is, necessarily, the formation of another partnership, the terms of which, when not otherwise expressly agreed upon, may be implied, from the manner of conducting the business, to be the same as those of the former partnership. 'What is inaccurately called provision against the dissolution of the partnership is an agreement that, if either party dies, his property shall remain in the firm and in the business, for the benefit of his children, or that his children, or some of them, or some other person, shall immediately on his death take his place in the firm, and become a partner in his stead. All these agreements and arrangements, and all that can be made for a similar purpose, are, in fact, only bargains for the creation of a new partnership when the old one ceases to exist. And so, too, all arrangements or contracts which may be made between the surviving partners and the representatives or appointees of the deceased have for their effect only the formation of a new partnership, which, upon some terms or other, takes the stock and carries on the business of the old one.' Parsons on Partnership, § 343. The effect cannot be otherwise of any arrangement for a continuation of the business, between the surviving member of the firm and the executor or other appointee under the will of the deceased member, made in pursuance of the will; for, upon the death of the partner, his personal estate, including his interest in the partnership, devolves upon his executor, and vests in the beneficiaries of the will, and becomes their property." Per Williams, J., in McGrath v. Cowen, 57 Ohio St. 385, 401, 49 N. E. 338 (1898).

In Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. 295, 57 Am. Rep. 552 (1886), it is said: "A provision in articles of partnership that, on the death of a partner, his executor, or personal representative, or some other person, shall be entitled to the place of a deceased partner in the firm, with the capital of the deceased in the firm business, or some part of it, is binding upon the surviving partner to admit the executor, personal representative, or nominee of the deceased partner, but does not bind the latter to come in. They have an option to come in or not, and a reasonable time within which to elect."

In holding that, where a partnership is dissolved by the death of a co-partner, no notice of dissolution is necessary, Bigelow, C. J., in Marlett v. Jackman, 3 Allen (Mass.) 287 (1881), said: "The delectus personarum lies at the foundation of the agreement of the parties, and is one of the main considerations on which it rests. The personal qualities of each member of a firm enter largely into the inducements which lead parties to form a copartnership; and if the abilities and skill, or the character and credit, of any one are withdrawn, the contract between them is terminated, and the copartnership is dissolved. When, therefore, by the death of a member of a firm, his personal liability ceases and his estate is by operation of law absolved from all future contracts and transactions entered into in the name of the firm, it would seem to follow, as a necessary consequence, that the power of the surviving partners to bind each other by new contracts and engagements must at once cease."

RAYMOND v. VAUGHAN.

(Supreme Court of Illinois, 1889. 128 Ill. 256, 21 N. E. 566, 4 L. R. A. 440, 15 Am. St. Rep. 112.)

Bill for accounting brought by George M. Vaughan against Samuel B. Raymond in the circuit court of Cook county. A decree was rendered in favor of complainant. Defendant took a writ of error to the appellate court. The decree was affirmed and defendant brings error to this court.

Per Curiam. This was a bill filed by defendant in error, Vaughan, against Samuel B. Raymond, plaintiff in error, to compel an accounting in respect of partnership affairs alleged to exist between them. The answer of Raymond expressly admits the formation of the copartnership, as alleged in the bill, and its continuance from September 15, 1874, to the 20th day of January, 1876, when the complainant, Vaughan, was adjudged insane. It will therefore be unnecessary to discuss the question of the partnership further than may become important in illustrating other branches of the case.

It is insisted by counsel for plaintiff in error that, if the partnership existed, first, that it was ipso facto dissolved by the adjudication of the insanity of Vaughan by the county court of Cook county on the 20th day of January, 1876, and that plaintiff in error, as conservator of Vaughan, accounted for all the property of Vaughan, and all his rights and credits accruing from the copartnership prior to said date in settlement of Vaughan's estate in said court, and that, the partnership being dissolved, Vaughan has no claim, legal or equitable, to the proceeds of the partnership business after such dissolution; second, if this is not so, that, the partnership being determinable at the will of either party, Raymond elected to determine the partnership,

and did terminate it, at the date of the adjudication of insanity, and that such dissolution can be inferred from circumstances, and that the circumstances proved show such election by him; third, that the discharge by the county court of Raymond, as conservator of Vaughan, upon his final report as such conservator, is a bar to relief sought by the bill in this case, so long as it remains unreversed; and, fourth, that, in any event, by a settlement made between the parties in Philadelphia in June, 1879, Vaughan received of Raymond $2,500 in full satisfaction and discharge of his interest in the business and profits of such copartnership.

The first contention presents a question of the most difficulty. It is said in Parsons on Partnership, 465: "There are not wanting strong reasons and high authority for the conclusion that insanity, certain, complete, and hopeless, of itself, and at once, dissolves the partnership; but we think the decided weight of authority in England and in this country opposes this conclusion, and holds that the partnership continues until it is dissolved by decree." Chancellor Kent, 3 Kent, Comm. 58, says: "Insanity does not work a dissolution of partnership ipso facto. It depends upon circumstances under the sound discretion of the court of chancery. But, if the lunacy be confirmed and duly ascertained, it may now be laid down as a general rule, notwithstanding the decision of Lord Talbot to the contrary, that, as partners are respectively to contribute skill and industry as well as capital to the business of the concern, the inability of a partner by reason of lunacy is a sound and a just cause for the interference of the court of chancery to dissolve the partnership, and have the accounts taken, and the property duly applied." And the same author (2 Kent, Comm. 645) says: "In cases of partnerships it would at least require a decree in chancery to dissolve the partnership on the ground of lunacy." Story, in his work on Partnership, § 295, says: "The common law, * * * upon grounds of public policy or convenience, holds that insanity does not ordinarily, per se, amount to a positive dissolution of the partnership, but only to a good and sufficient cause for a court of equity to decree a dissolution." This writer, however, adds: "We say 'ordinarily,' for where the insanity has been positively ascertained under a commission of lunacy, or by the regular judicial appointment of a guardian to the lunatic, it may deserve consideration, whether it does not ipso facto amount to a clear case of dissolution of the partnership by operation of law, since it immediately suspends the whole functions and rights of the party to act personally." Mr. Chief Justice Parker in Davis v. Lane, 10 N. H. 161, makes the same suggestion. That case was, however, upon the effect of insanity in revoking the power of an agent to act for his principal. Mr. Parsons also seems to be of the opinion that the courts would hold that where the insanity was determined by due inquest it would, per se, operate as a dissolution of the partnership. Both Story and Parsons refer, in support of this latter suggestion, to the case of Isler v. Baker, 6 Humph.

(Tenn.) 85, alone, to sustain the text. That case holds the doctrine indicated by Mr. Parsons, but stands, so far as we have been able to find, unsupported by any adjudicated case, and none are cited by the court in support of its conclusion. Collier on Partnerships, bk. 2, c. 3, § 3; Gow on Partnership, c. 5, § 1, each lay down the rule that a decree of a court of chancery is necessary to a dissolution of the partnership, notwithstanding there has been an adjudication declaring one partner a lunatic. In Besch v. Frolich, 1 Phil. Ch. 172, one of the partners had been adjudged insane upon commission of lunacy. Upon bill filed to dissolve the partnership, it was insisted that it should be decreed dissolved from the time of the incapacity of the insane partner. This the court, Lord Chancellor Cottenham delivering the opinion, held could not be done, and says: "That there are three considerations between partners—the share of each in the capital; the share of each in the good will; and the labor which each undertakes to devote to the business. Your argument is that because one of these considerations, and that, perhaps, the least valuable of the three, fails, you are entitled from that time to take to yourself the whole benefit of the other two. * * * Whatever delay has occurred is imputable to the plaintiff himself. It was competent for him to have filed his bill at any moment since the time when his partner first became incapable of attending to the business." In Jones v. Noy, 2 Mylne & K. 125, the partners were solicitors. One of them, Hardston, became insane, and incapable of attending to business, and died two or three years afterwards. Noy, the other partner, carried on the business one or two years, and then sold it out. Hardston's executors filed a bill to compel Noy to account in respect to the partnership business, and the proceeds of the sale. Sir John Leach, M. R., in determining the cause said: "It is clear upon principle that the complete incapacity of a party to an agreement to perform that which was a condition of the agreement is a ground for determining the contract. The insanity of a partner is a ground for the dissolution of a partnership, because it is immediate incapacity, but it may not in the result prove to be a ground of dissolution, for the partner may recover from his malady. When a partner, therefore, is affected with insanity, the continuing partner may, if he think fit, make it a ground of dissolution; but in that case I consider with Lord Kenyon that, in order to make it a ground of dissolution, he must obtain a decree of the court. If he does not apply to the court for a decree of dissolution it is to be considered that he is willing to wait to see whether the incapacity of his partner may not prove merely temporary. If he carry on the partnership business in the expectation that his partner may recover from his insanity, so long as he continues the business with that expectation or hope there can be no dissolution." See, also, Griswold v. Waddington, 15 Johns. (N. Y.) 57; Bagshaw v. Parker, 10 Beav. 532; Sadler v. Lee, 6 Beav. 324; Robertson v. Lockie, 15 Sim. 285; Pearce v. Chamberlain, 2 Ves. Sr. 33. * * *

The rule supported by the decided weight of authority, and announcing the correct doctrine, is that the insanity of a partner does not, per se, work a dissolution of the partnership, but may constitute sufficient grounds to justify a court of equity in decreeing its dissolution. But this doctrine must be understood and is applied by courts of equity with appropriate limitations and restrictions; for, while curable, temporary insanity will be sufficient, upon an inquisition, to sustain an adjudication of insanity in the county court, the appointment of a conservator, and commitment of the ward to an insane asylum, yet it will not authorize a court of chancery to decree a dissolution of a partnership, if the malady be temporary only, with a fair prospect of recovery within a reasonable time. Story, Partn. § 297. Under our system the adjudication of insanity may be had for the purpose of enabling those temporarily insane to avail themselves of the facilities for treatment and cure provided by the beneficence of the state. In such case the adjudication of the county court is necessary to their admission to the state hospital for the insane, where, in theory at least, the curable are admitted. It is manifest that the adjudication by the county court can have no effect in determining the partnership; and, upon bill filed to dissolve the partnership, it would have no other effect than to establish the insanity. Courts of equity will, as between the partners, look to the effect produced upon the partnership relations and business, and refuse to determine the partnership, and apply its assets, unless the insanity materially affects the capacity of the partner to discharge the duties imposed by his contract relation. A partner embraces the character both of principal and agent. For himself, with respect to the concerns of the partnership, he virtually acts as principal, and as agent for his partners. His power to act for them is coupled with an interest in all that pertains to the business of the concern. It would seem, therefore, that if for any reason one member of the firm should assume control and management of the business and affairs of the partnership, he should, while so controlling it, manage it for all, and in the interest of all the partners. His duty would not, perhaps, be strictly that of a trustee, but would be analogous to it, and he would not be allowed to derive personal advantage from the use of the partnership assets, or business or good will of the firm. This rule is universal in its application to fiduciary relations. Bowen v. Richardson, 133 Mass. 293; Freeman v. Freeman, 136 Mass. 260; Perry, Trusts, §§ 127, 128, 455–464. At any time after the insanity of Vaughan, the continuing partner had, if he saw proper to exercise it, the right to apply for a dissolution of the partnership, or, as it was a partnership at will, might have dissolved it of his own volition.

There is much evidence in the record tending to show that some time prior to January 20, 1876, Vaughan became deranged, but remained seemingly conscious of his own incapacity for business. Upon consultation with Raymond they went together to an asylum near Chicago, to consult a physician as to the best course to pursue, and it

was agreed and determined that application be made to the county court to have Vaughan adjudged insane. Vaughan testifies, and there is much in this record to corroborate his statement, that it was agreed by Raymond, in view of his going to the asylum to be treated for his malady, that he (Raymond) would look after and attend to the business of the firm, and carry it on in his absence. It is not, however, necessary to put the case upon that ground, for it does clearly appear that Raymond, without objection, or any notice to any one, continued the business precisely as before, and the presumption is that he did not intend a dissolution of the firm. It is to be presumed, in the absence of evidence showing to the contrary, that he waited to determine whether the incapacity of his partner would prove temporary merely, and it became practicable for him to resume business. So long as he thus continued to carry on the partnership business without taking steps to dissolve the partnership, there could be no dissolution or he be excused from afterwards accounting for the profits actually derived by him from the business of the firm. The circumstances relied upon as showing an election by Raymond to dissolve the copartnership are wholly insufficient. On the contrary, it appears that these parties were brokers; that for a number of years prior to the formation of this partnership Vaughan had represented as broker in the wholesale sugar market in Chicago the Franklin Sugar Refinery of Philadelphia, Pa., whose business was there conducted by Harrison, Havemeyer & Co. It also appears that Raymond had been likewise engaged as a broker in sugars in Chicago, he representing two or more sugar refineries in the east, each of the parties having realized considerable sums by way of commissions in the course of their business. By an arrangement between them, they consolidated their business, Vaughan receiving one-third, and Raymond two-thirds, of the profits, and they were to share losses and expenses in the same proportion. Each, however, remained the broker of the refineries that they had previously represented; that is, Vaughan represented the Franklin Sugar Refinery, and no change was made in the agency whatever. After Vaughan was adjudged insane, instead of dissolving the copartnership or doing any act showing an intent so to do, Raymond continued to carry on the business in all respects as before. Vaughan still continued to be the broker of the Franklin Sugar Refinery, and that concern had no notice of any change in its brokers at Chicago. It is shown that a very large business was done by Raymond, acting in the name of Vaughan, as broker of said refinery, and large profits were received by him therefrom. Vaughan had brought the business of the Franklin Sugar Refinery to the firm. No confidence had been reposed by this principal in Raymond, he at no time having acted as individual broker of that refinery. It was not until after Vaughan's discharge from the asylum that arrison, Havemeyer & Co. had any notice or intimation that Raymond pretended that a dissolution of the firm had taken place. And then, as it is clearly shown, to induce Harrison, Havemeyer & Co. to make

him their broker at Chicago, and to induce Vaughan to give up and surrender the business in that city, Raymond paid Vaughan $2,500. Negotiations were had between these parties through Mr. Harrison, of the firm of Harrison, Havemeyer & Co., and his testimony leaves no doubt that the payment of said sum of $2,500 by Raymond to Vaughan was for a surrender by Vaughan to Raymond of his (Vaughan's) right to act as broker for the Franklin Sugar Refinery in the Chicago market. We cannot undertake to review this evidence in detail, but it leaves no question in our minds that the dissolution of the firm did not take place at any time prior to the settlement before spoken of in respect to the future conduct of the business. * * *

We find no error in this record, and the judgment of the appellate court will be affirmed.

GRISWOLD et al. v. WADDINGTON et al.

(Supreme Court of New York, 1818. 15 Johns. 57.)

This was an action of assumpsit. The defendant Joshua Waddington was an American citizen, residing in New York, and the defendant Henry Waddington a British subject, residing in London. The defendants had been in partnership together, and carried on their business at London under the firm of Henry Waddington & Co., and at New York under the firm of Joshua Waddington & Co., The plaintiffs were citizens of the United States, resident in New York, and the demand sought to be recovered in this action was a balance of account arising on transactions between the plaintiffs and Henry Waddington, or the firm of H. Waddington & Co., during the late war between this country and Great Britain. * * * The jury found a verdict for the plaintiffs for $17,757.09, subject to the opinion of the court on a case made, with liberty to either party to turn the case into a special verdict, with power to the court to grant a new trial or a venire de novo. * * *

SPENCER, J. * * * Upon the fullest reflection which I have been able to give to the subject, my opinion is that the declaration of war between the United States and Great Britain produced a suspension during the war, or, ipso facto, a dissolution of the partnership previously existing between the defendants, so that the one is not responsible upon the contract, express or implied, of the other. It will be perceived that this proposition assumes the fact that the partnership between the defendants had not become dissolved by the efflux of the time, or the acts of either of the partners, although this point is, in itself, very questionable. The better conclusion from the evidence is that the partnership expired by its own limitation during the war; and the existence of the war would, at all events, dispense with the public notice which is, in general, necessary to the valid dissolution of a partnership.

The case discloses that the firm of Henry Waddington & Co. consisted of Henry and Joshua Waddington; that Henry is a British subject, resident before and during the war in London, conducting the partnership concerns there, whilst the defendant was resident here. The negotiations which gave rise to the present suit took place in England, and exclusively with Henry Waddington, during the late war between this country and Great Britain.

It was admitted on the argument, and so the fact undoubtedly is, that the proposition I have advanced is neither supported nor denied by any judicial decisions or elementary writer of the common law; but, if I mistake not, it is supported by the strongest reasons, and by necessary analogy with adjudged cases.

The first inquiry is, what are objects and ends of partnerships? They are entered into with the view that, with the joint funds, skill, and labor of the several partners, the interests of the concern may be advanced and promoted. There may be, and frequently are, different inducements influencing each partner. One may have more capital and credit. Another may have more skill, activity, and experience. The one may choose to be a dormant and inert partner, furnishing an equivalent for the services and skill of the other, and leaving the business entirely to his control and management. But, unexplained as this partnership is, we must understand it to be a union with a view to the employment of the joint capital, labor, and skill of both the partners for the purposes of internal and external commerce between this country and Great Britain. That the object of the partnership embraced both these objects of internal and external trade would seem to be unquestionable from the local position of the partners.

That the death, insanity, and bankruptcy of one of the partners operates as a dissolution was not questioned in the argument; and a respectable elementary writer, Mr. Watson, is of opinion that the marriage of a feme sole partner would produce the same consequence. The cases of Pearce v. Chamberlain, 2 Ves. 33, and Sayer v. Bennet, Watson, 382, and several other cases cited by him, all go to establish the general principle that death, insanity, or bankruptcy, work a dissolution of the partnerships, and they proceed on the principle that the other partners are not bound to admit the representatives of a deceased or insane partner into the concern; the confidence having been originally placed in the personal skill and assistance of those no longer able to afford it.

Let these principles be applied to the present case, and it would seem that the same result is inevitable. In what situation did the war put the defendants, as regarded each other? Most undeniably the two nations, and all their citizens or subjects, became enemies of each other, and the consequence of this hostility was that all intercourse and communication between them became unlawful. This is not only the acknowledged principle of the law of nations, but is also a part of the municipal jurisprudence of every country. I need not cite cases

in support of a position which has so repeatedly been recognized in the English courts, and in our own, possessing as well admiralty as common-law jurisdiction. Another consequence of the war was that the shipments made by each of the partners would be liable to capture and condemnation by the cruisers of the government of the other; and another very serious evil attended them: No debts contracted in the partnership name could be recovered in the courts of either nation; they not having, in the language of the law, a persona standi in judicio, whilst they were amenable to suits in the courts of both nations. The Hoop, 1 C. Rob. Adm. 201. It is true, the same disability to sue for debts due the firm antecedent to the war would exist. This however, does not weaken the objection. It remains still an important item, in considering whether a partnership exists, when the new debts created are to be liable to the same disability. It appears that Joshua Waddington is a citizen of the United States, and it has been already mentioned that Henry Waddington is a British-born subject. They owed different allegiances, and it became part of their duty to lend all their aid, in a vigorous prosecution of the war, the one to the United States, and the other to Great Britain; and it appears to me that it would not comport with policy or morality that the law should imperiously continue a connection, when by its very continuance it would afford such strong inducements to a violation of that fidelity which each owes to his government.

Again, all communication and intercourse being rendered unlawful, and it being a well-established principle that either partner may, by his own act, dissolve a partnership, unless restrained to continue it for a definite period by compact, in what manner could such intentions be manifested during the war. It might, indeed, be made known to the public of one of the countries, but it could not be notified to the public of the hostile country; and thus, unless the war produced a dissolution, he would be responsible, notwithstanding he had the desire to dissolve the connection, merely from inability to make known that determination—an inability produced by events utterly uncontrollable. When the objects and intentions of an union of two or more individuals to prosecute commercial business are considered, when it is seen that an event has taken place, without their fault and beyond their control, which renders their respective nations, and along with them the defendants themselves, enemies of each other; that all communication and intercourse has become unlawful; that they can no longer co-operate in the conduct of their common business, by affording each other advice, and are kept hoodwinked as to the conduct of each other; that the trade itself in which they were engaged has ceased to exist; that, if they enter into any contracts, they are incapable of enforcing their performance by an appeal to the courts; that their allegiance leads them to support opposite and conflicting interests—I am compelled to say that the law cannot be so unjust as to pronounce that partnership so circumstanced, when all its ob-

jects and ends are prostrated, shall continue; and with the clearest conviction upon my mind, and in analogy to the cases to which reference has been made, I have come to the conclusion that the partnership between the defendants was, at least, suspended, and I incline to the opinion that it was, ipso facto, dissolved by the war, and, consequently, that the defendant J. Waddington is not liable to this action. * * *

If the law worked a suspension or dissolution of the partnership, every person dealing with Henry Waddington was bound to take notice of the fact; and with the old dealers of the firm there was knowledge of all the material facts which enter into the determination of the cause.

Judgment for the defendant.

EUSTIS v. BOLLES et al.

(Supreme Judicial Court of Massachusetts, 1888. 146 Mass. 413, 16 N. E. 286, 4 Am. St. Rep. 327.)

Contract by William T. Eustis against Charles H. Bolles, George F. Wilde, and Francis D. Hall, to recover the balance of a promissory note. Hearing in the Supreme Judicial Court, before C. Allen, J., who reported the case to the full court.

Morton, C. J. This is a suit upon a note dated January 1, 1880, signed by "B. Callender & Co." It was signed and delivered to the plaintiff by B. Callender, and at that time the only parties composing the firm were the said Callender and the defendants Bolles and Wilde. The defendant Hall, who was formerly a partner, had withdrawn from the firm on July 2, 1877, and notice of the dissolution was given by publication in the Boston Daily Advertiser, but no personal notice was given to the plaintiff. The note in suit was given in renewal of a former note which the plaintiff held at the time of the dissolution. It further appears that the defendant Hall, in December, 1877, filed his petition in bankruptcy, was adjudicated a bankrupt and thereupon, in June, 1878, received his discharge. Upon these facts we are of the opinion that the defendant Hall is not liable in this action. The only ground upon which he could be held is that the plaintiff had no legal notice of the dissolution of the old firm. If the firm had not been previously dissolved, the bankruptcy of Hall would have dissolved it. The bankruptcy, like the death of a partner, dissolves the partnership, and as it is a public, notorious proceeding, all creditors are bound to take notice of it, and no further notice need be given. The publication of bankruptcy or insolvency proceedings is legal notice to all persons by which they are bound. Story, Partn. §§ 332–336; Arnold v. Brown, 24 Pick. 89, 94, 35 Am. Dec. 296; Marlett v. Jackman, 3 Allen, 287; Butler v. Mullen, 100 Mass. 453. The plaintiff was a creditor of Hall at the time of his bankruptcy. He is presumed to

have had notice of it, and this is notice that at that time the partnership had been dissolved. It is as effective a notice that the old copartnership no longer existed as it would be if the bankruptcy itself had worked the dissolution. * * *

We are therefore of opinion that the defendant Hall is entitled to a judgment.

The defendants Bolles and Wilde rely upon discharges under our insolvent laws. Their discharges were obtained under the statute of 1884, c. 236, as amended by the statute of 1885, c. 353. These statutes made a material change in our insolvent laws. * * *

We are therefore of the opinion that the discharges of the defendants Bolles and Wilde are a bar to the plaintiff's claim against them. Judgment for defendants.

SECTION 3.—BY JUDICIAL DECREE.

BARING et al. v. DIX.

(In Chancery, at the Rolls, Sir Lloyd Kenyon, 1780. 1 Cox, Cas. 213.)

On a bill filed by two partners against the third, praying an account of all partnership dealings, and that the partnership might be dissolved, and the leasehold premises, on which the trade had been carried on, might be sold, it appeared that the partnership had been originally instituted for the purpose of spinning cotton under a patent which had been obtained in that behalf, but that after several attempts the invention totally failed, and was now entirely given up. The defendant, Dix, refused to consent to the dissolution of the partnership, or the sale of the leasehold premises, notwithstanding it appeared that the mills must otherwise remain wholly unoccupied, and the rent be payable without any profit arising to answer it. And the counsel for the plaintiffs apprehended that they could not insist upon the dissolution of the partnership, or the sale of the premises, against the consent of the defendant; but his honor ordered "that upon the defendant's refusing to concur in the sale of the premises, and the dissolution of the copartnership, it should be referred to the master to inquire and state to the court whether the said copartnership business could now be carried on according to the true intent and meaning of the said articles of copartnership." And his honor declared that, if the master should report that it could not be so carried on, he would direct the premises to be sold, and would dissolve the copartnership. Reg. Lib. A. 1785, fol. 393.

N. B.—On the 30th of May following the defendant, Dix, signified his consent to the dissolution.

CASH v. EARNSHAW et al.

(Supreme Court of Illinois, 1872. 66 Ill. 402.)

SCOTT, J. This bill was to dissolve a copartnership entered into by the parties to this suit on the 26th day of November, 1869, for the purpose of carrying on the business of quarrying stone, and was to continue through the full period of five years.

The ground set out in the bill, upon which the plaintiff seeks relief, is the misconduct of the partner Emanuel Earnshaw. No cause of complaint is alleged against any other member of the firm. He is charged with specific acts of wrongful conduct and general mismanagement of the business of the firm. On account of the charges in the bill, plaintiff in error sought to have the court dissolve the copartnership, appoint a receiver, and close up the affairs of the firm. The court below denied the relief, and plaintiff brings the cause to this court on error.

It is not for every act of misconduct on the part of one partner that a court of equity, at the instance of another, will dissolve the partnership and close up the affairs of the company. The court will require a strong case to be made, and it is laid down as a general principle that a court has no jurisdiction to make a separation between partners for trifling causes or temporary grievances involving no permanent mischiefs. 3 Kent, 60.

Story, in his work on Partnership, states the rule to be that, to justify such an extraordinary interposition, the court always expects a strong and clear case to be made out of positive and meditated abuse. For minor misconduct or grievances, he says, if they require any redress, the court, ordinarily, will go no further than to act upon the faulty party by way of an injunction. Story on Partnership, § 288, and authorities cited.

We have carefully examined the evidence in the record, and we fail to discover that clear and satisfactory proof of the allegations in the bill that the law undoubtedly requires. Indeed, so far as we can see, there is no act on the part of Emanuel Earnshaw that the plaintiff in error can have any just cause of complaint, unless it was the failure to give him a check for $500 on the 12th day of November, 1870, when requested. And, if there was no explanation to this fact, we do not think that it is of sufficient gravity to justify the use of the extraordinary power by the court of equity to put an end to the entire contract between the parties. The contract of copartnership was deliberately entered into after mature consideration, and not without considerable knowledge of each other's characters and fitness, and it ought not to be dissolved on account of any mere trifling cause.

It is apparent, from what took place at the time, that Earnshaw did not intend any wrong to plaintiff in error by the refusal to give

the check. The evidence warrants us in saying that there was an honest dispute as to the amount then due to him. Plaintiff in error, for some reason satisfactory to himself, did not choose to have the accounts passed upon at that time, and hence the check was not given. It turned out, however, upon subsequent investigation, that there was more than the amount demanded due him, and he ought, in fact, to have the check; but Earnshaw may have been honestly in doubt as to the amount. If so, he ought not to be charged with willful misconduct, and his contract for that reason alone dissolved, and his business broken up. The consequences of the dissolution of copartnership are of too serious a character to be justified by so slight a cause. Under the most unfavorable view, it would only work a temporary inconvenience, and it is not pretended that any permanent injury resulted from the refusal to give him a check for the desired amount on that day. His own conduct in the premises is not altogether blameless, and he ought not to be allowed to make the mistaken judgment of his partner the ground for the dissolution of their contract.

By the agreement of the parties, Emanuel Earnshaw was made general superintendent of the affairs of the company, and it is insisted that he made large sales on credit to the injury of plaintiff in error as a member of the firm. It was not provided by the articles of copartnership that no sales should be made on a credit. It was, however, stipulated that no sales should be made on a credit by one member "against the express wish or consent of two others." The evidence tends to show that the sales that were made on credit, of which complaint is made, were not recklessly done, but were deemed reasonable sales at the time. Certainly they were not so improvidently made as to be regarded as willful misconduct on the part of the superintendent. Losses did occur, but they were through mere error of judgment. The credits given were for short periods, and other parties, considered prudent men, engaged in the same line of business, made similar sales with like disastrous results. In making the sales on credit, he violated no express agreement of the parties, and, inasmuch as it appears that it was in accordance with the custom of the trade, we see no grounds for just complaint against the action of the superintendent in this regard. He seems to have acted with reasonable prudence, and certainly no willful conduct can be imputed to him that ought to be visited with any serious consequences.

The most serious cause of complaint seems to be in regard to making the Shannon contract in the first place, and the subsequent agreement with Steele and McMahan to perform and complete his contract with them. It is alleged that by reason of the improvident contract with Shannon, and the subsequent agreement to complete the work on Lake street, large losses were incurred through mismanagement of Emanuel Earnshaw. No doubt the contract with Shan-

non was an unfortunate one, but it was certainly deemed a good one by all the parties when made, and, if he had been able to perform it, it would have been in the end greatly to their interest. When Shannon failed, Earnshaw deemed it most advantageous for the interest of all concerned that the company should assume the contract and complete the work. It was thought it would be a great saving to the company. It is true that the superintendent made the contract with Steele and McMahan without having first consulted with any of the partners; but they certainly all consented to the arrangement after it was made. Plaintiff in error says that he protested against the company assuming the contract; but he himself superintended the work for part of the time, and did other acts that cannot but be regarded as a ratification of the act of the superintendent in undertaking to complete the work. It does not appear but that, under all the circumstances, it was the very best thing the company could do, and perhaps prevented heavier losses than would otherwise have been sustained.

It is hardly necessary to comment separately on the other charges of misconduct. We do not find in all the record any cause of sufficient gravity, proven by clear and satisfactory evidence, that would justify a court of equity to interpose to put an end to the partnership relations between the parties. It may be that there were slight errors in judgment on the part of the superintendent; but no evidence of willful misconduct appears that would result in serious injury to plaintiff in error or any member of the firm. No reason appears that would prevent a profitable and harmonious co-operation between the several partners in the prosecution of the common business of the firm, and hence no cause for dissolution; and the decree of the superior court is affirmed.

Decree affirmed.[1]

[1] "The law seems to be well settled that a court of equity will dissolve a copartnership when the disagreements and disputes between the parties have become so violent and lasting as to prevent any beneficial effects from the continuance of the connection. Bishop v. Breckles, 1 Hoff. Ch. (N. Y.) 534; Collyer on Part. §§ 296, 297; Story on Part. § 287. The successful management of the business of a copartnership depends so essentially on mutual confidence and harmony of views between the partners that, when these are wanting, co-operation becomes impracticable. In Bishop v. Breckles the assistant vice chancellor, while observing that it requires more than the mere will of one party to justify a dissolution, still seemed to think that the continuance of the union should not be enforced when dissension had marred all prospect of the advantages contemplated at its formation; and this view is rational and in accordance with legal principles, for it would seem absurd to continue a partnership when it appeared that the parties refused to act together, or permit each other to act separately, in transacting the business of the concern." Per Cole, J., in Singer v. Heller, 40 Wis. 544, 547 (1876).

SMITH v. EVERETT.

(Supreme Judicial Court of Massachusetts, 1879. 126 Mass. 304.)

Bill in equity, filed June 14, 1877, alleging that, in response to an advertisement inserted by the defendant in a Boston newspaper, stating that a partner in business was wanted with a capital of $5,000, the plaintiff, being then out of business and desirous of some employment, called upon the defendant for the purpose of making inquiries as to the advertisement; that at that and subsequent interviews respecting the business the defendant represented to the plaintiff that the business in which he desired a partner was the manufacture and sale of an article called "starchene," or perfumed starch enamel, that the same was valuable and would prove very profitable to the plaintiff if he entered into it, that the defendant had an established business in Boston in the sale of the starchene of 15 gross bottles per week, that the same would continue and largely increase, that he had sold 60 gross of the same in New York, and had an established agency there, and also in Albany, and that the business in these cities was well established and prosperous; that by these representations the defendant gained the confidence of the plaintiff, and finally induced him to abandon plans which he had entertained, and had communicated to the defendant, of undertaking other business, and to enter into a partnership with him for the manufacture and sale of starchene, and to pay the defendant the sum of $2,000 for one-half interest, so called, in the business, and to enter into articles of copartnership for the term of one year; that the plaintiff paid to the defendant the sum of $2,000 in cash for one-half interest in said business; that the plaintiff had no means of ascertaining about the business, and the knowledge of the same and of its value was peculiarly in the defendant; that the plaintiff, by the necessity of the case, was obliged, and was induced by the defendant, to rely on these representations; that all the above representations and statements of the defendant were false and fraudulent, and the defendant knew them to be so.

The prayer of the bill was that the articles of copartnership might be canceled, that an account be taken of the amount paid by the plaintiff to the defendant and his outlays in said business, that the defendant might be decreed to repay the same to the plaintiff, that the defendant might be restrained by injunction from using the name of the plaintiff in said business, and for general relief. The defendant demurred to the bill, assigning the following grounds of demurrer: (1) That the plaintiff had a plain, adequate, and complete remedy at common law. (2) Multifariousness. (3) Want of equity. Hearing before Endicott, J., who overruled the demurrer; and the defendant appealed to the full court.

GRAY, C. J. Upon the allegations in the bill, which are admitted

by the demurrer, the defendant, by false and fraudulent representations as to the extent of his business, induced the plaintiff to enter into a partnership with him for a definite period, which would make the plaintiff liable to creditors as a partner. Against such liability by reason of the defendant's fraud a court of law could afford the plaintiff no adequate remedy. Equity has therefore jurisdiction to order the partnership articles to be canceled, and to restrain the defendant from using the plaintiff's name as a partner; and, having obtained jurisdiction for that purpose, may administer complete relief in the same suit, by ordering the defendant to repay the sums advanced or expended by the plaintiff on account of the partnership. Pillans v. Harkness, Colles, 442; Ex parte Broome, 1 Rose, 69; Rawlins v. Wickham, 3 De G. & J. 304; Jauncey v. Knowles, 29 L. J. (N. S.) Ch. 95; Story, Part. §§ 232, 285.

Decree affirmed.

CHAPTER X.

LIMITED PARTNERSHIPS.

SECTION 1.—THEIR ORIGIN AND CHARACTERISTICS.

AMES v. DOWNING.

(Surrogate's Court of the County of New York, 1850. 1 Bradf. Sur. 321.)

BRADFORD, Surrogate. * * * The testator at the time of his decease was a special partner of Mr. Hicks, the executor, in business in this city, and the position has been taken by the counsel for the executor, that the firm was not dissolved, but, notwithstanding the testator's decease, continued until the expiration of the term limited for its duration. The idea at first impression is apt to win attention, if not favor, but on closer scrutiny cannot, I think, be upheld. The legislation which brought into existence among us this form of partnership had for its main object the encouragement of commerce by permitting the investment of capital in trade, without danger to the public or risk to the special partner beyond the extent of the amount invested; and in determining the legal consequences incidental to the introduction of such an institution there seems to me no reason for departing from the rules of the common law any further than is fairly and naturally requisite to give full effect to the intent of the statute, resting upon the presumption that, the Legislature having expressed the points in which the common law was intended to be abrogated, that line should not by judicial construction be extended, except by way of reasonable and necessary inference to effectuate the general objects of the statute. The special partnership is by no means a complete anomaly. By the statute it is termed a partnership, and both as to the rights of the parties to the contract and as to the world it is in itself a proper partnership, except as it limits the liability of the special partner and restricts his control over the business of the firm. The members are partners, and by slight irregularities may easily be turned into general partners. The statute terms them partners. Except for the statute they would be general partners; and, from participating in the profits, it would seem to be a just consequence that they are partners in every sense, subject to liabilities and enjoying privileges as partners in every particular, except as otherwise specially provided. The common law regulates the mutual rights and duties and liabilities of partners, and governs these limited

partnerships in every respect not excepted out of the general rule by this statute. The twelfth section (Rev. St. [4th Ed.] pt. 2, c. 4, tit. 1) provides that every alteration which shall be made in the names of the partners shall be deemed a dissolution of the partnership, and the necessary effect of an assignment by a special partner of his interest in the firm would be to alter the name of the special partner and thus to work dissolution. Such would likewise seem to be the consequence of the death of the special partner, which effects an alteration in the name, by operation of law, through the medium of an administrator. The eighteenth section declares, also, that the general partners shall be liable to account to each other and to the special partners in law and equity as other partners now are by law; and the twenty-fourth section provides that no dissolution by the acts of the parties shall take place previous to the time specified for the duration of the partnership, without public notice. There appears to be nothing in the act incongruous with the idea that the partnership is governed by the rules applicable to general partnerships except in the particular cases enumerated. There is nothing irreconcilable with the dissolution of the partnership by operation of law in the usual cases. I have looked into the statute of several of the states where similar laws have been enacted, and, while they all imply that a dissolution may occur by operation of law, those of Massachusetts, Michigan, Rhode Island, and Virginia expressly admit of that mode of dissolution. The Code of Louisiana declares that all partnerships shall terminate with the death of one of the partners, and quite a number of these acts prescribe that in cases not provided for the law relating to general partnerships shall govern. Rev. St. Mass. 1836, p. 306, c. 34, §§ 11–13; Civ. Code La. 1838, arts. 2799, 2810, 2851; Rev. St. Me. 1840, p. 264, c. 45; Comp. Laws Miss. 1824–38, p. 839; Rev. St. Mich. 1838, p. 156, c. 5; Rev. St. N. J. 1847, p. 872; Laws Pa. 1837–38, p. 691; Comp. Laws R. I. 1844, p. 282; Code Va. 1849, p. 583, c. 145; Rev. St. Conn. 1849, p. 528; Rev. St. Ind. 1838, p. 429, c. 78; Code Ga. 1848, p. 373.

Now, if any other principle is admitted, what is the result? If the death of the special partner does not cause a dissolution, shall that of the general partner have that effect? If the death of the special partner does not dissolve the firm, shall his executor or administrator be the partner? If so, does not that introduce a new name into the firm? And, if it does, then the executor or administrator becomes a general partner, and if a general partner, then he can dissolve the firm (Rev. St. [3d Ed.] p. 50, pt. 2, c. 4, tit. 1, § 12), or, on the other hand, the estate he represents may be thrown into the hazards of a general partnership, and the executor or administrator have to attend personally to the transaction of a regular partnership business. The above statement of some of the embarrassing results which would flow from this novel proposition should induce hesitation and caution in admitting it.

No doctrine is more universally established than that by the death of any one of the partners the partnership is ipso facto dissolved; and this, not only as to the deceased partner, but also as between all the survivors, and however numerous the association may be. The reasoning upon which this result is attained, as well as the rule itself, is amply illustrated by the civilians; the doctrine having its foundation in the civil law, though it has been recognized and adopted to its fullest extent by the common law. The personal qualities, skill, character, and credit of each partner enter so thoroughly into every contract of this kind that the law very wisely considers it a personal contract, expiring with death. Though these reasons are not so apposite to a special as to a general copartnership, yet they are measurably applicable. It is true that a special partner has no control over the business of a firm, and contributes, as a matter of duty, no portion of his time, labor, or abilities towards the management of its affairs; but he may from time to time examine into the state and progress of the partnership concerns, and advise as to their management. This brings him into the most intimate relations with the general partner; and, in view of his right to give advice, it is evident the general partner may, perhaps, have built up well-founded hopes of a successful and thriving trade upon the experience, wisdom, and abilities of his associate—expectations sure to be destroyed by death. How often is it the case that a successful merchant, retiring from the cares of active business, enters into a partnership of this kind, where his knowledge and sagacity and his influence are important inducements with the general partner to enter into the contract. Does a limited partnership survive the death of the special partner? Then it is compulsory on the survivor to receive into the partnership, at all hazards, the executor or administrator of the deceased, his next of kin, a creditor or stranger taking administration, or the assignee of such personal representatives; and whatever may be the inconvenience and hardship of being thus thrown against his will into connection with a stranger, or, perchance, with some one personally disagreeable or hostile, the general partner must submit to the examination of the books, the visits, and the advice of the incomer. Gow on Partn. p. 220, § 3; Collyer (3d Am. Ed.) p. 99. The joint-stock companies, many of which exist in England, often comprise a large number of persons, and, though generally managed by officers chosen at elections held by the stockholders, they are liable to the application of the same rules of law in regard to death and dissolution as general partnerships, unless provision be made to meet the case in the deed of settlement or articles of agreement. Collyer, §§ 1112, 1113, 1115.

The system of limited partnerships, which was introduced by statute into this state, and subsequently very generally adopted in many other states of the Union, was borrowed from the French Code. 3 Kent, 36; Code de Commerce, 19, 23, 24. Under the name of "la société en commandite" it has existed in France from the time of the

Middle Ages; mention being made of it in the most authentic commercial records, and in the early mercantile regulations of Marseilles and Montpelier. In the vulgar Latinity of the Middle Ages it was styled "commenda," and in Italy "accommenda." In the statutes of Pisa and Florence it is recognized so far back as the year 1166; also in the ordinance of Louis le Hutin, of 1315, the statutes of Marseilles of 1253, and of Geneva of 1588. In the Middle Ages it was one of the most frequent combinations of trade, and was the basis of the active and widely extended commerce of the opulent maritime cities of Italy. It contributed largely to the support of the great and prosperous trade carried on along the shores of the Mediterranean, was known in Languedoc, Provence, and Lombardy, entered into most of the industrial occupations and pursuits of the age, and even traveled under the protection of the arms of the Crusaders to the city of Jerusalem. At a period when capital was in the hands of nobles and clergy, who, from pride of caste or canonical regulations, could not engage directly in trade, it afforded the means of secretly embarking in commercial enterprises, and reaping the profits of such lucrative pursuits, without personal risk; and thus the vast wealth, which otherwise would have lain dormant in the coffers of the rich, became the foundation, by means of this ingenious idea, of that great commerce which made princes of the merchants, elevated the trading class, and brought the Commons into position as an influential estate in the Commonwealth. Independent of the interest naturally attaching to the history of a mercantile contract, of such ancient origin, but so recently introduced where the general partnership, known to the common law, has hitherto existed alone, I have been led to refer to the facts just stated, for the purpose of showing that the special partnership is, in fact, no novelty, but an institution of considerable antiquity, well known, understood, and regulated. Ducange defines it to be: "Societas mercatorem qua uni sociorum tota negotiationis cura commendatur certis conditionibus." It was always considered a proper partnership, societus, with certain reserves and restrictions, and in the ordinance of Louis XIV of 1673 it is ranked as a regular partnership. In the Code of Commerce it is classed in the same manner. I may add, as an important fact, for the explanation of a distinction to which I shall shortly advert, that the French Code permits a special partnership, of which the capital may be divided into shares, or stock, transmissible from hand to hand. In such a case, the death of the special partner does not dissolve the firm, the creation of transmissible shares being a proof that the association is formed respectu negotii, and not respectu personarum; but even in such a partnership the death of the general partner effects a dissolution, unless it is expressly stipulated otherwise. But, says M. Troplong, it would be wrong to extend the rule that a partnership, of which the capital is divided into transmissible shares, is not dissolved by the death of a shareholder, to a special partnership, the capital of which is not so divided. The stat-

ute of New York recognizes only the latter kind of partnership; the names of parties being required to be registered, and any change in the name working a dissolution and turning the firm into a general partnership. Such a partnership has always been held to be dissolved by the death of the special partner. This partnership remains under the dominion of the common law. It has created between the special and general partner a tie, which is not subjected to the caprice of unforeseen changes. It has produced mutual relations of confidence, which the general partner cannot be forced to extend to strangers. M. Troplong, Com. du Contrat de Société Civile, etc., tom. 1, preface, 57, § 377, etc.; Id. tom. 2, p. 368, § 888. The French jurists generally take the same position, defining the special partnership as a proper partnership, and applying the law of dissolution by death to all. Pothier, Traite du Contrat de Société, cc. 2, 8, § 3; Merlin, Repertoire de Jurisprudence, art. "Societe," § 7; Duranton, Droit Français, tom. 17, 1, 3, tit. 9, § 470. Pardessus discusses the question somewhat at length. Droit Commercial, tom. 4, pt. 5, tit. 3, c. 1, § 4. It might be thought, he says, with some appearance of plausibility, that the rule of a dissolution by death should be limited to general partnerships, in forming which the probity and intelligence of each member have been reciprocally taken into consideration. Indeed, the special partnership does not suppose, on the part of the general partners, any personal confidence in the special partners; and, as the interests and the rights of the latter are exclusively limited to their shares, it would seem they were not modified by their decrease, and their heirs, called to take their place, could have no right to insist that death had dissolved the firm, nor the general partners insist upon that result. These reasons, to question the general rule, appear, nevertheless, to yield to others more decisive. The persons and the character of the special partners have been regarded by the general partners when they formed this kind of association. The special partners are, in effect, to a greater or less extent, called to annual accountings, to meetings for the settlement of the profits and losses, and to an examination of the state of affairs. This security, and a right to insist upon a dissolution in consequence of a breach of the contract, or to urge their claims when the affairs are liquidated, are more or less vigorously exercised. The difficulty of acting harmoniously with different persons, substituted in the place of those with whom the original contract was made, the distrust of heirs, who have not the grounds of esteem and confidence which influence the deceased, and the impossibility of treating easily with minors, are some of the reasons which will not permit special partnerships to be excepted from the general rule. It may be objected that these reasons apply only in favor of the general partners, and that it is for them to judge as to the continuation of business with the heirs. But the heirs of the deceased ought to enjoy the same privilege. Reciprocal right ought to result from a mutual agreement. There is no solid reason why the special partner-

ship should not be dissolved by the death of one of the partners, except when the capital is divided into transmissible shares, in which case the associates have consented that each may substitute another in his place, as he may desire, without the authority of the others, it is natural to conclude that the heirs of a deceased member fill his place in the same manner as if he had assigned his share. I have given the substance of the reasoning of Pardessus, and the result he attains has not only the authority of M. Troplong in its favor, but also that of other commentators—M. L. Malpeyre, et Jourdain, No. 474; M. Persil, fils, p. 344—while it does not appear to have been questioned or doubted.

It thus appears that in the jurisprudence of that nation whence the peculiar contract of special partnership has been adopted by us and grafted into our law—where the system has long existed, is familiarly known, and its nature, qualities, and practical relations to various events and circumstances have been well considered under the light of no brief experience—the effect of the death of the special partner is to dissolve the firm. This agrees with the conclusion I had attained upon independent reasoning before consulting these authorities, and I am consequently led to pronounce the firm in which the testator was a special partner dissolved at his death, and to hold the executor, who was his general partner, responsible for the testator's interest in the firm at that time, upon a liquidation of the affairs as if made then. * * *

SECTION 2.—THEIR FORMATION AND CONDUCT.

MANHATTAN CO. v. LAIMBEER et al.

(Court of Appeals of New York, 1888. 108 N. Y. 582, 15 N. E. 712.)

Action by the president and directors of the Manhattan Company against Richard H. Laimbeer and others, as general partners, for failure to record the certificate of limited partnership required by law. Judgment for plaintiff, and defendants appeal.

PECKHAM, J. Unless the courts below were right in holding that the filing of the certificate with the county clerk, in the absence of the recording thereof, was insufficient, in order to form a limited partnership under the act, this judgment must be reversed, because there was undoubtedly evidence enough in the case to go to the jury upon the question of fact whether or not the certificate and affidavit provided for in the act were filed with the county clerk, and the certificate left with him for the purpose of being recorded, and the fee therefor prepaid. Enough was done to make the filing of the papers

complete, if the evidence of the boy was to be believed. A paper is said to be filed in a public office when it is delivered to the proper officer, and by him received, to be kept on file. 1 Bouv. Law Dict. 587. It is not necessary that the party handing the paper to the officer should see that he makes the proper indorsement or entry.

A verdict was directed by the court in favor of the plaintiff in this action, based upon the assumption that the failure of the county clerk to record the certificate provided for in the act, and which was to be filed and recorded in his office, prevented the formation of a limited partnership, and left the parties who attempted to form the partnership liable as general partners. Under this holding, the defendant has been made liable to the extent of nearly $60,000 for debts incurred by the general partners after the special partner had done all that he could do to comply with the terms of the statute; or, in other words, after the certificate required by the statute had been acknowledged, and after the necessary affidavit had been made, and after they had both been filed in the office of the county clerk, and after, as matter of fact, the amount of money required to be contributed by the special partner had been paid in cash. Under such circumstances, to hold the defendant liable as a general partner for the failure of a public officer to do an act, the doing of which at any particular moment the defendant had no power to compel, works a very severe administration of the statute, and is a construction not called for by the language used, when reasonably interpreted, and is contrary to what it seems to me is a fair public policy, as it makes one man liable for the default of another, and he a public officer, over whose actions he has no control.

It is said that this special partnership is a privilege granted, and is an exemption from the general liability of partners at common law; and so the statute must be strictly construed, and all its provisions fully and even technically complied with, before such exemption can be claimed. In one aspect, of course, it is a privilege, because at common law no such partnership could be formed; but at the same time the granting thereof accords with the policy of a commercial community, because it tends to the enlargement of business transactions to permit men, under certain reasonable conditions, to do business with a restricted liability, who without such restriction would suffer a portion of their capital to remain unemployed, rather than risk their whole possessions under the broad liability of a general partnership. Therefore acts providing for the formation of a limited partnership should receive a reasonable construction; not such as to make its formation almost impossible, and not such that where the slightest and most innocent (and to third persons an entirely harmless) deviation from the strictest construction that can be given to a statute shall work results to the special partner of possibly a most disastrous and utterly ruinous nature, including liability for enormous debts incurred by the general partners, where the credit given was

not in the least based upon any assumed liability of the special partner greater than the capital he had contributed.

The earliest statute upon the subject of the formation of limited partnerships is that of the act of 1822. It may be well to compare the provisions of that act with the one enacted in the Revised Statutes, for the purpose of seeing what, if any, change has been made by the latter act. The important provisions contained in the act of 1822 in relation to the formation of such partnerships are that, before such a partnership can be formed, there must be a certificate signed by the partner containing (1) the name of the firm; (2) the names of all the general and all the special partners; (3) the amount of the capital furnished by the special partner; (4) the period when the partnership is to commence and terminate. There is also to be an affidavit made by one or more of the general partners stating the actual payment in cash of the sum advanced by the special partner. The certificate above mentioned is to be registered in a book to be kept for that purpose, at all times open for public inspection, in the office of the clerk of the county in which the principal business of the partnership shall be carried on; but this registry shall not be made by the clerk of the county, or be considered valid, unless all the partners, general and special, associated together in any such partnership, shall make a certificate containing the statements above set forth; which certificate is to be filed of record in the clerk's office. It is made the duty of the partners to publish the terms of such partnership, so registered, for at least six weeks after such registry, in two papers. By the eighth section of this statute, it is, among other things, specially made the duty of the partners interested in any such partnership to see that the requirements of the sixth, seventh, eighth, and twelfth sections of the act (which required the certificate and affidavit and registry, etc.) are complied with; and in case the same shall be neglected, or a false registry be made, all the parties interested in such partnership shall be liable for all the engagements thereof as general partners. By the sixth section of this act, it is seen that the registering of the certificate mentioned in the twelfth section is to be made in a book to be kept for that purpose, at all times open to public inspection, in the office of the clerk of the county; and the eighth section of the act specially casts upon the partners interested in the partnership the duty of seeing that this registry is made, upon pain of making all the partners interested therein liable for all the engagements of the firm as general partners. From the time of the passage of this act of 1822 it remained substantially in that condition until the adoption of the Revised Statutes, when the act was recast. But in the Revised Statutes, although different language is used in many parts of them, yet the same general requirements are made for the formation of such a partnership. The certificate is to be made as provided for in the act of 1822, and the same information is to be given in it, with the addition that there is also to be stat-

ed the general nature of the business intended to be transacted by the copartnership. This certificate is to be acknowledged as provided for in the act of 1822. An affidavit is also to be made by one of the general partners, and to be filed in the office of the county clerk, stating that the sums specified in the certificate have been contributed by each of the special partners to the common stock, and in good faith, and actually paid in cash. But, instead of the simple provision for the registering of the certificate in a book in the office of the clerk of the county, the Revised Statutes (section 6) provide that the certificate thus acknowledged, etc., shall be filed in the office of the county clerk, and shall also be recorded by him, at large, in a book to be kept for that purpose, open to public inspection; and the duty is not in terms cast upon the partners of seeing that such record is made. In this respect it seems to me there is a very material difference in the requirements of the two acts. The act also provides for the publication in two newspapers of the terms of the partnership, as provided for in the act of 1822; and there are other provisions in both acts relating to the workings of the partnership which are substantially similar, and in almost the same language. The sixth section of the act of 1822 provides that, before any partnership under that act shall be carried into effect, the things above provided for shall be done; and among them is the registering of the certificate. The duty to see that the registry is made, having been specifically and in plain terms cast upon the partners, it might perhaps be justifiable to hold them liable under this section until such registry is made. Under the Revised Statutes, however, the question is entirely different. It is true that the eighth section states that no such partnership shall be deemed to be formed until a certificate shall be made, acknowledged, filed, and recorded, nor until the affidavit shall have been filed as above directed. But the question is, what was the real meaning of the legislature in using that language, while leaving out the provision making it the duty of the partners to themselves to see to the recording of the certificate? Did it mean the strict, technical, and physical act of recording at length the certificate in the book, or did it mean what is usually meant in using the word "recorded" in the statutes; that is, until it shall have been filed and left for the purpose of being recorded, or, in other words, until all shall have been done by the individual interested in the performance of the act that he could do, and where the further act to be done is the act of a public officer, over whom no prompt or immediate control could be exercised by the individuals interested, and for whose action or lack of action they ought not to be suffered to sustain a loss? * * *

All this difficulty is avoided by holding what it seems to me is the fair and plain intention of the legislature, viz., that when the parties have done all that they can do in the way of complying with the terms and conditions of the limited partnership act, and when all that re-

mains to be done is for a public officer (intrusted with the care and custody of the papers filed with him) to perform the duties placed upon him under the provisions of the law, it must be regarded as a compliance by the parties interested with the terms of the statute, and the record must be assumed to be made when the paper goes for the purpose of record out of the control of the individual into the control of the public officer. It is said that the same reasoning would apply to the publication in the newspapers of the terms of the partnership as provided for by the act. But it seems to me an entirely different principle applies there. The duty of making the publication is cast upon the partners; and there is no obligation on the part of the publisher of the paper, as there is on the part of the public officer, to do anything. Again, it is matter of private contract between the partners and the publishers of the newspapers; and in that way it is within the power of the partners to see to it that the publication is made within the time required in the statute, and that it correctly states the terms of such partnership. However, the effect of a failure to publish is not now before us. * * *

Judgment reversed. New trial granted.[1]

LINEWEAVER v. SLAGLE.

(Court of Appeals of Maryland, 1886. 64 Md. 465, 2 Atl. 693, 54 Am. Rep. 775.)

MILLER, J. Several questions arise on this appeal, and present, for the first time in this court, the construction of certain sections of article 72 of the Code, relating to "limited partnerships." The suit was brought by the appellee against Luther W. Hopkins, Charles T. Matthews, and David W. Slagle, as partners, doing business under the firm name of Hopkins, Matthews & Co. This firm failed, and made an assignment for the benefit of its creditors on the 29th of April, 1884. The cause of action sued on was a promissory note for $404, signed in the firm name, dated the 1st of April, 1884, and payable, at 30 days, to the order of Lineweaver & Co., of which latter firm the plaintiff was the surviving partner. There was no controversy as to the liability of Hopkins and Matthews, but Slagle set up the defense that he was a special partner, and the effort of the plaintiff was to hold him responsible as a general partner.

At the trial several exceptions were taken by the plaintiff to the rulings of the court, which present the real subjects of dispute, and these have been argued by counsel with much zeal and ability. The testimony shows that on the 15th of March, 1880, these three parties, Hopkins, Matthews, and Slagle, formed a partnership, under the firm name of Hopkins, Matthews & Co., to carry on a general

[1] The dissenting opinion of Gray, J., in which Ruger, C. J., concurred, is omitted.

commission business in the city of Baltimore, in which Slagle became a special partner, and contributed $5,000 capital. This partnership, by its terms, commenced on the 15th of March, 1880, and ended on the 14th of March, 1882, and in regard to its due formation no question arises. It is conceded that all the requisites and formalities required and prescribed by article 72 of the Code were duly followed and complied with. In this firm Slagle was unquestionably a special partner merely, and not, therefore, liable for its debts beyond the $5,000 which he had contributed to its capital. On the 15th of March, 1883, the day succeeding that limited for the duration of this partnership, the same parties executed and acknowledged the following certificate: "Be it remembered, and it is hereby certified, that we, Luther W. Hopkins and Charles T. Matthews, as general partners, and David W. Slagle, as special partner, and all residing in the city of Baltimore, in the state of Maryland, have formed and entered into a limited partnership under the name or firm of Hopkins, Matthews & Co., and intend to transact a general commission business in the city of Baltimore. The said David W. Slagle has contributed $10,000 to the capital of the firm, and the partnership is to commence on the 15th day of March, 1882, and is to terminate on the 28th day of February, 1885."

This certificate was duly recorded, and the "terms of the partnership" duly published in the newspapers; and it has been contended by counsel for the appellee that this partnership is to be regarded as a renewal or continuance of the one which it succeeded. But we think it clear that this position cannot be sustained. The law has made special provisions for such "renewal or continuance," and, where that is the object to be accomplished, these provisions must be followed. By section 9 it is declared that "every renewal or continuance of such partnership beyond the time originally fixed for its duration shall be certified, acknowledged, and recorded, and an affidavit of a general partner be made and filed, and notice be given in the manner herein required for its original formation; and every such partnership which shall be otherwise renewed or continued shall be deemed a general partnership." And by section 10 it is provided that every alteration which shall be made in the names of the partners, in the nature of the business, or in the capital or shares thereof, or in any other matter specified in the original certificate, shall be deemed a dissolution of the partnership; and every such partnership, which shall in any manner be carried on after any such alteration shall have been made, shall be deemed a general partnership, unless renewed as a special partnership under the provisions of the last preceding section.

The necessities of this case do not require us to decide what must be the form of the certificate for "renewal or continuance" under these sections. It is sufficient to say that the change in the amount of the capital to be contributed by the special partner from $5,000 to $10,000 makes this, in legal contemplation, a new partnership, and not

a renewal or continuance of an old one; and such would naturally be the conclusion reached by any one who might read this certificate on the records, or see in the newspapers the publication of the "terms of the partnership" in conformity therewith. From the information thus derived no one could for a moment suppose that it was the intention of the parties to renew or continue an old firm. We are therefore clearly of opinion that Slagle's right to hold the position of a special partner in this partnership is in no wise aided or affected by the fact that he was such in the old one. So far as his rights in this respect are concerned, they must be treated and dealt with as if this certificate was in fact, as it is in law, the formation of a new and original partnership.

The next question is, did Slagle contribute and pay the $10,000, as the law requires, so as to entitle him to the status and immunity of a special partner? In various sections of this article it is provided that the special partner "shall contribute in actual cash payments a specific sum as capital to the common stock"; that a certificate shall be executed, acknowledged, and recorded, which shall state, among other things, "the amount of capital which each special partner shall have contributed to the common stock"; that at the time of filing this certificate there shall also be filed an affidavit of one or more of the general partners, "stating that the sums specified in the certificate to have been contributed by each of the special partners to the common stock have been actually and in good faith paid in cash"; that, "if any false statement shall be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners"; and that "the partners shall publish the terms of the partnership, when registered, for at least six weeks, immediately after such registry, in two newspapers, to be designated by the clerk of the court in which such registry shall be made." These are some of the conditions which the legislature has seen fit to attach to the privilege of participating in the profits of a partnership without absolute liability for its debts. One of the objects they are intended to attain is notice to the public of the exact terms of the partnership, so that those who deal with it may do so advisedly. Another, and the most important, is that the contribution by the special partner shall be made in actual cash. This also has in view the protection of the public. "Its object is to provide a fund on the day the company is formed, to be thereafter subject to no contingencies or losses except those which come from the proper business of the partnership" (Haggerty v. Foster, 103 Mass. 19); and wherever the question has arisen the courts have uniformly exacted a strict compliance with this condition. The contribution cannot be made partly in cash and partly in goods, credits, or assets of another firm taken at a valuation, nor will government bonds or any other class of commercial securities, no matter how valuable they may be, or how easily convertible into money, be accepted as a substitute for

the "actual cash payments" which the statute requires. Haviland v. Chace, 39 Barb. (N. Y.) 283; Pierce v. Bryant, 5 Allen (Mass.) 91; Haggerty v. Foster, 103 Mass. 17; Richardson v. Hogg, 38 Pa. 153; In re Merrill, 12 Blatchf. (U. S.) 221, Fed. Cas. No. 9,467; Van Ingen v. Whitman, 62 N. Y. 513.

Nor is it material that the parties may have acted in good faith, and have honestly intended to comply with the law, and have honestly supposed the transaction did gratify the statute; for, as was said by Folger, J., in the case last cited: "The statement of the amount of the cash payment is required, so that the public may guage thereby the extent of its dealings with the firm. The affidavit is called for that the public may have reliance upon the existence of the fact of payment. The statute is thwarted, the public is misled and deceived, as much when there is an unintentional untruth as when there is an intentional one. This statute does not set out to deal with motives, but with acts and their results; and it guards the public, not by requiring good intentions, but a certain act done in a certain mode, and a true statement that it has been thus done." To the same effect is the decision in the Massachusetts case (Haggerty v. Foster, 103 Mass. 17), where it was held that government bonds could not be regarded as equivalent to cash within the meaning of the statute. "It is wholly immaterial," say the court, "that the transaction at the time was honestly intended and understood by the parties to be sufficient; that the securities actually transferred afforded the means by which their cash value was in fact subsequently realized, or that creditors were not actually defrauded. The statute is plain and explicit. The use of the phrase 'actual cash payment' is emphatic and significant. It is wisely intended to exclude a construction by which commercial securities of any description may be regarded, by the aid of mercantile usage, as substantially equivalent to cash, and to remove from all parties the temptation to evade its requirements in this respect."

This brings us to an examination of the facts attending the alleged contribution and payment of the $10,000. The proof shows that on the 15th of March, 1882, the day on which the certificate was signed, and about 10 o'clock a. m., Slagle gave to the firm of Hopkins, Matthews & Co. a certified check on the Citizens' National Bank for $10,000, which was soon afterwards deposited by the firm, and passed to its credit; that in a few hours, and on the same day, between 2 and 3 o'clock p. m., the firm gave Slagle its check on the same bank for $6,500; and that three days afterwards the firm, by another check, paid him the sum of $1,119.16. There is further proof to show that the old firm kept their account in the same bank, and on the 15th of March, 1882, and prior to the deposit of Slagle's check, that account was overdrawn to a small amount; and that, on that day and the next, neither the old firm nor the new one, nor Hopkins and Matthews, the general partners in both, had any money in bank out of which the $6,500 check could be paid, save that which was derived from

Slagle's check for $10,000. Assuming, then, that these were the facts, or that a jury would so find from the evidence, the transaction amounted simply to this, that Slagle on the morning of the 15th of March, 1882, paid in his $10,000, and a few hours afterwards, on the same day, $6,500 of the same money was paid back to him. Now, we take it to be too plain for argument that this was not such a "contribution" of $10,000 to the common stock of the firm, that day formed, as the law requires. In no legitimate sense of the word can the paying of money one hour, and receiving it back the next, be said to be a "contribution" of it for any purpose whatever. We hold it to be clear that, to gratify the statute, the special partner must pay his money into the common stock, and leave it there to the risks of the business. The payment and devotion of the money to the business of the firm must be actual and absolute, not apparent and illusory. If the terms referred to leave any doubt that this is what the statute means, that doubt must be removed by the thirteenth and fourteenth sections, in which it is expressly declared that "no part of the sum which any special partner shall have contributed to the capital stock shall be withdrawn by him, or paid or transferred to him in the shape of dividends, profits, or otherwise, during the continuance of the partnership," and if, by payment of interest or profits, his capital shall be reduced, he "shall be bound to restore the amount necessary to make good his share of capital, with interest." * * *

In our opinion, the requirement that the special partner shall "contribute" a specific sum "in actual cash" was made by the legislature for the very purpose of preventing such transactions. The statement, therefore, in the certificate and affidavit that Slagle had made this contribution of $10,000 was, in legal contemplation, "a false statement," no matter in what good faith or with what honest intentions he and his associates may have acted. It follows from what has been said that the court was right in rejecting the defendant's fifth prayer, but wrong in granting the third in lieu of it, and also in rejecting the plaintiff's second and fifth prayers.

The defendant's fourth prayer, as we read it, simply asserts the proposition that payment by a certified check on a bank in good standing, and which the bank actually pays, is a good mode of payment under the law of limited partnership, and that the mere fact that a special partner has paid his contribution by such a check does not make him a general partner. Taking this to be the sole effect of that prayer, we have no fault to find with it. When a bank certifies a check to be good, it is bound to pay it when presented by the payee (if he be other than the drawer), or by any subsequent holder; and, if a check be given bona fide on a banker having funds to pay it, it is in this state prima facie payment, if accepted as cash. Moses v. Bank, 34 Md. 581; Woodville v. Reed, 26 Md. 190.

The case also presents another question which involves the construction of the fifteenth, sixteenth, and seventeenth sections. In section 15 there is a provision that "every sale, assignment, or transfer of

any property or effects of such partnership, made by such partnership when insolvent or in contemplation of insolvency, or after or in contemplation of the insolvency of any partner, with intent of giving a preference to any creditor of such partnership, shall be void as against the creditors of such partnership." Section 16 declares that "every such sale, assignment, or transfer of any of the property of a general or special partner when insolvent, or in contemplation of insolvency, or after or in contemplation of the insolvency of the partnership, with intent of giving to any creditor of his own or of the partnership a preference over the creditors of the partnership, shall be void as against the creditors of the partnership." And by section 17 it is provided that "every special partner who shall violate any of the provisions of the two last preceding sections, or who shall concur in or assent to any such violation by the partnership, or by any individual partner, shall be liable as a general partner." It appears from the proof that on the 24th of April, 1884, only five days before the firm failed, Hopkins and Matthews conveyed a house and lot, which belonged to the firm, and stood in their names, to the firm of Charles W. Slagle & Co., of which the appellee was a member, for the consideration of $2,485.62, of which $1,985.62 consisted of loans, with interest thereon, previously made by Slagle & Co. to the grantors. In reference to this transaction the appellant insists that if, at the time this deed was made, the firm and Hopkins and Matthews were in fact insolvent or unable to pay all their debts as they fell due in the regular course of business; and if Hopkins and Matthews knew the true condition of the firm, or could, by the exercise of reasonable diligence, have discovered it; and if Slagle also knew the true condition of the firm, and of Hopkins and Matthews, or could have discovered it by the exercise of reasonable diligence without interfering with the conduct of the firm's business—then the deed was made with the intent to prefer the grantees therein; and, having been made to Slagle himself and others, it must be presumed to have been made with his concurrence, and he, therefore, by virtue of this seventeenth section, became liable as a general partner. This is the substance of the plaintiff's seventh prayer. The legal proposition asserted is that upon the facts stated the law presumes the intent to prefer, and that such intent need not be proved as an independent fact. This prayer was granted, and, in our opinion, this ruling correctly construes these sections of the statute. If a man is actually insolvent, and knows it, or by the exercise of reasonable diligence could know it, and deliberately conveys a portion of his property to one of his creditors, and thereby pays in full that creditor's claim, the necessary effect is to prefer that creditor, and from such an act the law conclusively presumes the intent to prefer. * * *

Judgment reversed, and new trial awarded.[1]

[1] The statutes of a few states permit the contribution to capital to be in cash or property: First Nat. Bank v. Creveling, 177 Pa. 270, 35 Atl. 595 (1896); Holiday v. Paper Co., 3 Colo. 342 (1877).

COLUMBIA LAND & CATTLE CO. v. DALY. SAME v. MURKINS.

(Supreme Court of Kansas, 1891. 46 Kan. 504, 26 Pac. 1042.)

Horton, C. J. The same questions are presented in both cases, and therefore we consider them together. The Columbia Land & Cattle Company is a corporation organized under the laws of Colorado. In the first case Thomas Daly brought his action against that corporation to recover the value of certain goods, wares, and merchandise alleged to have been purchased by D. B. Powers, as a "special partner" of the corporation, and also for the amount of certain sight drafts made by D. B. Powers upon H. S. Halley, the general manager of the corporation. The total amount of these claims is $529.70. In the second case Joseph Murkins brought his action against the corporation and D. B. Powers, the "special partner," to recover $224.50 for use of a pasture. The corporation in both cases filed verified answers containing general denials, and also denials that D. B. Powers was a "special partner" or any other partner of the corporation. There was no further appearance on the part of the corporation, and judgment was rendered against it for the several amounts claimed. The case is brought here by the corporation upon the ground that, under the pleadings, the plaintiffs below were not entitled to recover. Both of the petitions, as amended, allege that D. B. Powers is a "special partner" of the corporation, and as such partner made the corporation liable for the amount sued for. A pleading is always construed most strongly against the pleader, and the allegation in the amended petitions concerning D. B. Powers, as a "special partner," under the provisions of paragraph 3992, Gen. St. 1889, renders the petitions fatally defective: "A special partner may, from time to time, examine into the state and progress of the partnership concerns, and may advise as to their management; but he shall not transact any business on account of the partnership, nor be employed for that purpose as agent attorney, or otherwise. If he shall interfere, contrary to these provisions, he shall be deemed a general partner." Gen. St. 1868, c. 74, § 16. The corporation could not be made liable upon the contract or purchase of D. B. Powers as a "special partner." He had no authority, under the allegations of the amended petitions and the statutes, to bind the corporation or partnership; therefore, upon the amended petitions, the plaintiffs below were not entitled to recover. * * *

The judgments will be reversed, and the causes remanded.

JAFFE v. KRUM.

(Supreme Court of Missouri, 1886. 88 Mo. 669.)

BLACK, J. The agreed facts show that O. M. Jaffe and William Robertson made a limited partnership under the statute of this state, the business to be conducted under the name of William Robertson; Jaffe being the special partner. All the statutory prerequisites were complied with. The special partner thereafter advanced to the firm $15,503.96 as a loan, having previously paid in his entire contribution, as agreed upon in the written partnership agreement. Thereafter the partnership became insolvent, and Robertson, for the firm, made a deed of voluntary assignment. Jaffe, who had his demand allowed by the assignee, now claims to be entitled to share pro rata with the other creditors as to his demand arising from the loan. The assignee denied to him this right, and so did the trial court.

The general scope of the statute with respect to limited partnerships is to provide how they may be formed, to exempt the special partner from personal liability for the debts, to deprive him of all power to manage the affairs, and to determine when and under what circumstances he shall be held as a general partner. Section 3409 is as follows: "If the partnership becomes insolvent, no special partner shall be paid as a creditor of the firm, or receive the benefit of any lien in his favor as such until the other creditors of the firm are satisfied." The common law determines the rights and liabilities of partners in general, and that law governs in those limited partnerships where no contrary provision is made by the statute. Marshall v. Lambeth, 7 Rob. (La.) 471; Ames v. Downing, 1 Bradf. Sur. (N. Y.) 326.

Now there is no room for doubt as to what the section of the statute above quoted means. In case of insolvency of the partnership it excludes, or rather postpones, the special partner as a creditor until the other creditors are satisfied. Advances made by him to the partnership by way of a loan are clearly within its terms. It cannot be confined in its operation to the advances made by way of contribution to the capital under the articles of partnership. That would render the section wholly useless, for without it there is nothing in the statute which would permit the special partner to share with the other creditors as to his part of the capital invested. The whole scope of the act is to the effect that he subjects that to the hazards of the enterprise. The lawmakers have used emphatic language, and we have nothing to do but abide by their words. Other courts have reached the same conclusion upon statutes in substance the same as the one under consideration. White v. Hackett, 20 N. Y. 179; Mills v. Argall, 6 Paige (N. Y.) 577; Ward v. Newell, 42 Barb. (N. Y.) 482; Dunning's Appeal, 44 Pa. 150.

The judgment in this case is affirmed.[1]

[1] In Clapp v. Lacey et al., 35 Conn. 463 (1868), it was held that the special partner could prove and share ratably with other firm creditors for all claims except his claim for capital.

TILGE et al. v. BROOKS et al.

(Supreme Court of Pennsylvania, 1889. 124 Pa. 178, 16 Atl. 746, 2 L. R. A. 796.)

PAXSON, C. J. The defendant below, Matthew Brooks, was sued as a copartner with W. Howard Brooks and A. May Stevenson for a debt admittedly due by the firm of W. Howard Brooks & Stevenson. The grounds upon which this claim rested are these: Matthew Brooks had intended and attempted to form a partnership with W. Howard Brooks and A. May Stevenson, in 1871, as a special partner. This special partnership was in fact a renewal of one made in 1866. The renewed partnership expired in 1876, when Matthew Brooks retired from the firm. The sales for which it is sought to make him liable were made in 1881, or about five years after dissolution of the firm of which he had been a member. When he retired, no notice was given of the dissolution. It was claimed—and I do not understand it to be disputed—that there were such irregularities in the formation of the special partnership as to make the special partner liable to the penalties provided by the act of Assembly in such cases. The eighth section of the act of 21st of March, 1836 (P. L. 1835–36, 143), in regard to limited partnerships, provides that, "if any false statement be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners." There can be no doubt that during the time the defendant Brooks was a member of this firm he was liable for its engagements by reason of his noncompliance with the statute. The plaintiffs below claim that he was in point of fact a general partner, and was liable, after he left the firm, to creditors, by reason of his failure to give notice of his withdrawal; and a number of authorities are cited in support of this proposition, among others, Andrews v. Schott, 10 Pa. 47, where it was said by this court: "For, unless the conditions of the act are substantially observed, all the defendants are general partners." The language quoted from Andrews v. Schott would seem to be justified by the phraseology of the act of 1836, as, for instance, "if the special partner transact any business on account of the partnership, or be employed for that purpose as agent, attorney, or otherwise, he shall be deemed a general partner." Like instances might be given from other sections of the act. But, when the act declares that under certain circumstances a special partner shall be deemed a general partner, it certainly does not mean that he is in fact a general partner; indeed, there is in the language an implication that he is not. Nor do I see how the Legislature can make a man a member of a firm without his consent and the consent of the firm. It may, indeed, make him liable for the debts of a firm as though he were a general partner; and this is all the Legislature probably intended to do. The confusion upon this subject may be occasioned by the inaccurate language sometimes employed in referring to it. A

man who is not a member of a firm may yet make himself liable to its creditors by holding himself out to such creditors as a partner. Yet in fact he does not become a partner. He is merely liable as a partner. There being no general partnership, so far as Brooks was concerned—only a liability on his part for the debts of the limited partnership because of its irregularities—we see no reason why he should have given notice of the dissolution of a partnership which never existed. Haviland v. Chace, 39 Barb. (N. Y.) 283, was decided upon the New York statute, and is not consistent with our own act of 1836; nor are authorities elsewhere of much service to us in construing it. Under our statute no general partnership was formed. It does say that an omission to comply with its requirements shall have the effect of creating a partnership not intended by the parties.

Judgment affirmed.

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SUPPLEMENTARY LIST

OF CASES ON

THE UNIFORM PARTNERSHIP ACT
THE UNIFORM LIMITED PARTNERSHIP ACT
LIMITED PARTNERSHIP ASSOCIATION
ACTS AND BUSINESS TRUSTS

WITH THE TEXTS OF

THE UNIFORM PARTNERSHIP ACT AND THE
UNIFORM LIMITED PARTNERSHIP ACT

BY

WILLIAM EVERETT BRITTON
PROFESSOR OF LAW IN THE UNIVERSITY OF ILLINOIS

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SUPPLEMENTARY LIST

OF

CASES ON PARTNERSHIP

In re FORT.

Ex parte SCHOFIELD.

(Court of Appeal. [1897] 2 Q. B. 495.)

Appeal from the Manchester County Court.

In April, 1894, T. B. Schofield advanced to the debtor, J. W. Fort, a sum of £3000. upon a promissory note to enable the debtor to set up business as a jeweller at Manchester. It was agreed between them that, in consideration of such advance, the debtor should pay to Schofield by way of interest 5 per cent. and a half share of the net profits of the business. That agreement was not in writing. In April, 1896, Schofield pressed for repayment of the money, and on August 15 he commenced an action on the promissory note for the recovery of the £3000. and interest. As a defense to that action the debtor pleaded that they were partners. At the trial the jury decided that they were not partners and judgment was entered for the plaintiff. In April, 1897, a receiving order was made against the debtor. At a meeting of creditors held on April 23 Schofield tendered a proof for the amount of his judgment debt, which proof was objected to, but admitted by the official receiver for the purpose of voting. At that meeting a resolution was passed by a majority in value of the creditors present, including Schofield, that G. H. Lawton be appointed trustee. An alternative resolution was passed appointing one Heathcote trustee, if Schofield's proof ought not to be admitted.

On May 12 a motion was made on behalf of Heathcote in the Manchester County Court for a declaration that Schofield's proof was invalid, and that the financial relationship between Schofield and the debtor had been such as to disentitle Schofield to receive anything in respect of his loan until the claims of the other creditors of the debtor had been satisfied. The judge rejected the proof except as to a

sum of £135. 10s., and declared that the resolution appointing Heathcote trustee was to be deemed to have been carried.

Schofield appealed to the Divisional Court.[1]

Vaughan Williams, J. This is an appeal against an order of the county court whereby the appellant's right of proof against the debtor's estate was postponed to those of the other creditors on the ground that his claim was in respect of a loan of the kind dealt with by section 3 of the Partnership Act, 1890. The question which we have to decide is whether the case falls within that section.

The contract upon which the loan was advanced provided that the lender should be entitled to a share of the profits of the borrower's business by way of interest upon the loan, but that contract was not in writing. The ground of the appeal is that section 2, subsec. 3 (d),[2] applies only to a case where the loan is under a contract in writing signed by the parties, and that the postponement provided for by section 3 is only intended to operate in cases falling within section 2, subsec. 3(d). In my judgment the appellant's contention is right. It is plain that clause (d) gives to persons who lend money under a written agreement signed by the parties thereto a certain benefit, and it is obvious that section 3 intended to impose a burden as a condition of the benefit so conferred by clause (d). I think it was not intended that that burden should be imposed in any case in which the statute did not confer the benefit. It would be enough for me to leave the matter there, for the construction of the act seems reasonably free from ambiguity; but I think also that the history of the law on this subject points to the conclusion that the construction which I have put on the section is the right one. Previously to the decision in Cox v. Hickman, 8 H. L. C. 268, the proposition laid down in Waugh v. Carver (1793) 2 H. Bl. 235, that receipt of a share of the general profits of a business of itself constituted a partner-

[1] The arguments of counsel, the concurring opinion of Wright, J., and the opinions in Appeal of Heathcote are omitted.

[2] English Partnership Act, 1890, § 2, subsec. 3: "The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

"(d) The advance of money by way of loan to a person engaged or about to engage in any business on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing and signed by or on behalf of all the parties thereto."

Section 3: "In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section * * * being adjudged a bankrupt * * * the lender of the loan shall not be entitled to recover anything in respect of his loan * * * until the claims of the other creditors of the borrower * * * for a valuable consideration in money or moneys worth have been satisfied."

Compare section 7 (d) of the Uniform Partnership Act. See In re Hoyne (C. C. A.) 277 Fed. 668 (1922).

ship, was generally regarded as a correct proposition of law. Then in Cox v. Hickman, the House of Lords overruled that doctrine, and established that receipt of profits was only prima facie evidence of a partnership. A few years later Bovill's Act (28 & 29 Vict. c. 86) was passed, which act, notwithstanding criticisms passed upon it in Pooley v. Driver (1876) 5 Ch. D. 458, and other cases, I believe to have been an act framed upon the basis of the law being as it was declared to be in Cox v. Hickman. The cases in which that act was criticised seem to lay down that although the receipt of profits may be evidence of the existence of a partnership, it is so only to the extent to which it shews that the parties intended that relationship. As soon as these doubts were cast upon the basis of the law on which Bovill's Act was founded, the act became difficult of application. In that state of things the Partnership Act, 1890, was passed, and section 2, subsec. 3, of that act seems to give a statutory effect to the basis of law upon which Bovill's Act purported to be founded, and makes it clear that if there is a receipt of a share of the profits and nothing more, there is a partnership. It may be that the surrounding facts are sufficient to rebut the presumption of partnership, but prima facie the recipient of the profits is a partner. That being so, I think that the construction which I have put upon section 3 of the Act of 1890 will work no commercial injustice, for a person who lends money upon an oral agreement for a share of the profits runs this risk—that mere receipt of the profits under such an agreement will prima facie make him a partner. I think that any court which had to deal in such a case with the question of partnership or no partnership would hold that the onus of proof which the receipt of profits casts upon the recipient was an onus not easily to be satisfied; because when a court finds that an important mercantile transaction is without sufficient explanation arranged by word of mouth instead of being committed to writing, it will regard it with all the jealousy with which courts regard transactions which are not in accordance with business principles and business forms, and will make every intendment against it. This appeal must be allowed.

BROWN, JANSON & CO. v. A. HUTCHINSON & CO.

(Court of Appeal. [1895] 1 Q. B. 737.)

The plaintiffs brought an action against J. A. Hutchinson and the firm of A. Hutchinson & Co., of which he was a member, upon a bill of exchange for £3000., drawn by J. A. Hutchinson upon and accepted by the firm, and they obtained judgment under Order xiv against J. A. Hutchinson for £3034. 17s., leave being granted to the firm to defend the action. The plaintiffs then applied by summons

under section 23 of the Partnership Act, 1890, for an order charging the interest of J. A. Hutchinson in the partnership business with the amount of the judgment debt, and for the appointment of a receiver of his said partnership interest.

It appeared at the hearing of the summons that J. A. Hutchinson had no property which could be taken under a writ of fieri facias or elegit. It further appeared that the firm of A. Hutchinson & Co. was constituted a societé en commandité according to the law of France for the manufacture and sale of india rubber goods; that its registered office was in Paris, but that it had a branch office in London for the sale of the manufactured goods, and that this branch business was formerly managed by J. A. Hutchinson.

The learned judge granted the application.

The firm of A. Hutchinson & Co. appealed.[3]

LINDLEY, L. J., stated the facts, and continued:

The Partnership Act of 1890, as is well known, made very little alteration in the legal procedure except by section 23.[4] Section 23 is absolutely new. It replaced a very cumbrous method of proceeding which had to be adopted before and even under the Judicature Act. When a creditor obtained a judgment against one partner and

[3] The arguments of counsel and the concurring opinion of A. L. Smith, L. J., are omitted.

[4] English Partnership Act, 1890, 53 & 54 Vict. c. 39, § 23: "(1) After the commencement of this act a writ of execution shall not issue against any partnership property except on a judgment against the firm.

"(2) The High Court, or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a county court, may, on the application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon, and may by the same or a subsequent order appoint a receiver of that partner's share of profits (whether already declared or accruing), and of any other money which may be coming to him in respect of the partnership, and direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favor of the judgment creditor by the partner, or which the circumstances of the case may require.

"(3) The other partner or partners shall be at liberty at any time to redeem the interest charged, or in case of a sale being directed, to purchase the same."

Compare sections 24 and 28 of the Uniform Partnership Act.

English Partnership Act, § 31: "(1) An assignment by any partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any accounts of the partnership transactions, or to inspect the partnership books, but entitles the assignee only to receive the share of profits to which the assigning partner would otherwise be entitled, and the assignee must accept the account of profits agreed to by the partners.

"(2) In case of a dissolution of the partnership, whether as respect all the partners or as respect the assigning partner, the assignee is entitled to receive the share of the partnership assets to which the assigning partner is entitled as between himself and the other partners, and, for the purpose of ascertaining that share, to an account as from the date of the dissolution."

Compare section 27 of the Uniform Partnership Act.

he wanted to obtain the benefit of that judgment against the share of that partner in the firm, the first thing was to issue a fi. fa., and the sheriff went down to the partnership place of business, seized everything, stopped the business, drove the solvent partners wild, and caused the execution creditor to bring an action in chancery in order to get an injunction to take an account and pay over that which was due by the execution debtor. A more clumsy method of proceeding could hardly have grown up. In order to stop that a new method was introduced, which is explained and indicated in section 23. Clause 1 says, "After the commencement of this Act a writ of execution shall not issue against any partnership property except on a judgment against the firm." That puts a stop at once to all such proceedings as I have been alluding to. The sheriff cannot now go and seize the property of the firm if a debt is due by one of the partners only. That is absolutely stopped.

Then the second part of that section really recasts the whole of the procedure which formerly prevailed with regard to the mode of ascertaining the amount due by the judgment debtor: "The High Court or a judge thereof, or the Chancery Court of the County Palatine of Lancaster, or a county court, may, on application by summons of any judgment creditor of a partner, make an order charging that partner's interest in the partnership property and profits with payment of the amount of the judgment debt and interest thereon." What is the effect of that? That has no immediate effect on the copartners at all. It simply amounts to this—that the interest of their copartner in the business is charged just as if he had given an equitable charge over his interest. It does not harass or affect the other partners in the least. Then, in order to give effect to that charge, provision is made for the appointment of a receiver of that partner's share and profits. The effect of that is that the appointment of a receiver operates as an injunction against the execution debtor receiving anything from his copartners, and if his copartners pay over to him anything with knowledge of the appointment of the receiver they may get into trouble. But then that does not produce money, except money which the copartners may hand over, or could hand over to the judgment debtor partner if it were not for the receiver. In order to get the full benefit of the charge, the section proceeds: "The court may direct all accounts and inquiries, and give all other orders and directions which have been directed or given if the charge had been in favor of the judgment creditor by the partner, or which the circumstances of the case may require." That means this—that an order may be made to take an account of what is due from the copartners to the judgment debtor partner, and there is a clause (section 33, subsec. 2) which enables the solvent partners to treat that as a dissolution. There is a clause which enables the solvent partners to proceed, if they think fit, to get rid of the judgment debtor. That is the machinery provided.

Now, that is intended unquestionably, to supersede the old practice; and whenever there is a firm, I do not care how it is constituted, carrying on business here with assets which the sheriff could seize under the old practice, this section is applicable.

That is the case here. Mr. J. A. Hutchinson carries on business over here under the name of A. Hutchinson & Co., with or without the foreign members, and there are assets in that place of business, which is a branch place of business, which assets the sheriff could seize under the old practice. I think there is ample jurisdiction to make this order, and I do not think it will prejudice or affect the foreign partners at all, unless indeed, they came over here and insisted upon handing over to the judgment debtor the money which they ought to hand over to the receiver; and the receiver cannot go to Paris and enforce this order. Neither does it authorize the receiver to receive partnership assets. He has no business to locate himself in this branch of business and stop there. All he can do is to give notice to the other partners about payments to the judgment debtor. But as regards the judgment debtor, the appointment of a receiver is extremely important, because if he, in violation of this order, receives anything from his copartners and the receiver finds it out, he can order him to hand it over. The judgment creditor need not bring an action against him; he can get a four-day order enforcing obedience by a speedy process. It appears to me, therefore, that there is jurisdiction to make this order, that the order is right, and that this appeal proceeds on a theory that it has a much greater effect than it has. It has no effect at all abroad. I may add, for the satisfaction of the appellants, that if they choose to pay off the judgment creditor they can do so under clause 3 of section 23. I think that this appeal must be dismissed with costs.

Appeal dismissed.

BROWN, JANSON & CO. v. A. HUTCHINSON & CO.

(Court of Appeal. [1895] 2 Q. B. 126.)

* * * The plaintiffs obtained an order under section 23 of the Partnership Act, 1890, charging the interest of the defendant J. A. Hutchinson in the partnership business with the amount of the judgment debt, and appointing a receiver of that interest. This order was appealed against and affirmed by the Court of Appeals. See [1895] 1 Q. B. 737. They then applied for and obtained the order appealed against, which directed the defendants A. Hutchinson & Co. to deliver to the plaintiffs within one month or such extended time as might be allowed by the judge an account of the share of profits of the defendant J. A. Hutchinson in the partnership of the defendants A. Hutchinson & Co., whether already declared or accruing to him in respect of the said partnership, and of any other money which

might be coming to him in respect of the said partnership; and that the said defendants A. Hutchinson & Co. should forthwith pay the profits and moneys found to be due to the said J. A. Hutchinson to the receiver appointed as before mentioned. The defendants A. Hutchinson & Co. appealed against this order.[5]

RIGBY, L. J. This case depends upon section 23, subsec. 2, of the Partnership Act, 1890. The latter part of that subsection provides that the court or a judge may "direct all accounts and inquiries, and give all other orders and directions which might have been directed or given if the charge had been made in favor of the judgment creditor by the partner, or which the circumstances of the case may require." Reading the subsection with section 31, subsec. 1, which provides that an assignment by a partner of his share in the partnership, either absolute or by way of mortgage or redeemable charge, does not, as against the other partners, entitle the assignee, during the continuance of the partnership, to require any accounts of the partnership transactions, I think it plain that the intention of the legislature was that, under ordinary circumstances, in dealing with a case under subsection 2 of section 23, the analogy of an assignment by a partner of his share should be adhered to. In order to get rid of such inconveniences as arose under the old law in cases where the partnership property was seized to satisfy the separate judgment debt of one of the partners, it is provided by section 33, subsec. 2, that a partnership may, at the option of the other partners, be dissolved if any partner suffers his share of the partnership property to be charged under the act for his separate debt. That provision is, of course, only applicable to English partnerships; and whether there is in this case an English partnership as well as the French partnership, or, if not, what the French law on the subject under such circumstances may be, we are not in a position to say. It seems to me that the words at the end of subsection 2 must be taken as meaning that prima facie the judgment creditor who has obtained a charging order under that subsection shall have such remedies as a person would have in whose favor a charge had been made by a partner upon his share in the partnership; and that by so reading them we are not depriving such a judgment creditor of any right which he would have had under the law as it previously existed. Treating that as being the general rule laid down by the subsection, what then is the meaning of the concluding words of the subsection, "or which the circumstances of the case may require"? I do not look upon those words as having no effective meaning. I think that they recognize that the analogy of an assignment of a share in the partnership by a partner might not in all cases afford the rule which is to be acted upon under the new law. But I cannot think that the previous words referring to the

[5] Part of the statement of facts, the arguments of counsel, and the concurring opinion of Lopes, L. J., are omitted.

remedies given to an assignee by way of charge were inserted without reason, as would be the case according to the wide construction of the subsection contended for by the plaintiffs. I think they were inserted as an instruction with regard to the rule to be acted on in ordinary cases, and that the concluding words were added to give under special circumstances a wider jurisdiction to direct accounts than would have existed in the case of an assignee; and what the special circumstances so contemplated may be it seems to me unnecessary for the purposes of the present case to endeavor to define, for, when I look at the facts, I cannot find any special circumstances whatever to take the case out of the ordinary rule indicated by the subsection. I do not think that in a case like the present the legislature ever intended that an account should be directed as against the other partners during the continuance of the partnership. I therefore agree with my brother Lopes that this appeal should be allowed.

Appeal allowed.

VILLAGE OF WESTBY v. BEKKEDAL et al.

(Supreme Court of Wisconsin, 1920. 172 Wis. 114, 178 N. W. 451.)

Action by the Village of Westby against M. H. Bekkedal and others. Judgment for plaintiff and defendants appeal.

M. H. Bekkedal & Son are a partnership located at Westby, Wis., engaged in the business of buying, storing, handling, and shipping of tobacco. E. Rosenwald & Bro. are a partnership having its principal office and place of business in the city of New York, and engaged in the selling, handling, and merchandising of tobacco. On March 6, 1917, the two partnerships entered into a contract by the terms of which the Bekkedals (party of the second part) were to buy tobacco of 1916 crop, raised in the state of Wisconsin, in joint account with the party of the first part (the Rosenwalds), and attend to the packing and handling of the same. The Rosenwalds agreed to attend to the marketing of the tobacco so purchased and packed, and apply all the net proceeds of any sales made to the credit of the joint account, as kept on their books.

The contract contained a provision as to the manner in which advances were to be made by each of the parties to the contract, the Rosenwalds to advance 60 per cent. and the Bekkedals 40 per cent. The Rosenwalds agreed to use every effort to dispose of the tobacco to the best advantage, and the Bekkedals agreed to give their sole attention to the buying, packing, and handling of the joint account holding. It was agreed that the net profits or net losses should be shared, 60 per cent. to the Rosenwalds and 40 per cent. to the Bekkedals. The contract required that the name of E. Rosenwald & Bro. should show distinctly on each warehouse used for the packing or handling of joint account tobacco. While the contract covered the crop of 1916,

it was to continue unless terminated by three months' notice. It appeared without dispute that under the contract a large amount of tobacco was bought and stored, packed and prepared for shipment, and sold under the contract, and the net proceeds for the year 1917 was the sum of $345,296.11; that all of the business transactions relating to the sale and marketing of said tobacco were conducted, managed, and directed by the Rosenwalds, including the procuring of purchasers, collection of purchase price, the shipping, invoicing, insuring, and the fixing of prices, without participation therein by the Bekkedals, and that such sales were made to purchasers without the state of Wisconsin; that when sales were made the tobacco was loaded on board cars by the Bekkedals and shipped to purchasers directly from Westby and other warehouses located in Wisconsin, upon order of the Rosenwalds; that all the proceeds of the sales were collected by the Rosenwalds at their office without the state of Wisconsin, and that at the time the proceeds of such sales were received no part of the tobacco sold was located within the state of Wisconsin.

It further appeared that M. H. Bekkedal, on April 30, 1918, at the request of the income tax assessor, and without the actual knowledge or express authority of the Rosenwalds, made, signed, and filed, as was required by law, a joint return with the income tax assessor, and that upon the return so made there was assessed jointly against the partnerships an income tax for the year 1917 of $20,352.76, which amount was duly certified and placed upon the tax roll of the plaintiff village for the year 1918. It further appears that on May 1, 1918, there was assessed and levied against the personal property belonging to the joint accountants a tax amounting to $8,657.39, which taxes were afterward paid; that out of the amount of taxes so paid the Rosenwalds claim the right to offset $5,194.44, and the Bekkedals $3,462.95, against any tax which the court might find and determine in this action is justly due from the defendants; that the Rosenwalds had no information as to the assessment of the taxes upon the return made and filed, before the same had been certified by the county clerk of Vernon county to the clerk of the village of Westby.

The case was tried by the court, and the court found upon the facts as stated that the contract between the two partnerships amounted to a partnership contract creating a partnership, that the income derived from the business of the joint account was income derived from property and business transacted within the state of Wisconsin, and that the defendants made no appearance before the county board of review for income tax assessment; allowed an offset of $8,657.29 personal property tax. The plaintiff had judgment for the remainder, from which judgment the defendants appeal.

ROSENBERRY, J. (after stating the facts as above).[6] The principal contention of the defendants here is that the court erred in holding

[6] Parts of the opinion are omitted.

that the income in question was derived from property located or business transacted within the state of Wisconsin, within the meaning of the income tax act. It is further contended that the court erred in holding that the contract of March 6, 1917, entered into by the partnerships, created a partnership. * * *

On the part of the defendants it is argued that the relationship between the defendant partnerships was that of a joint adventure rather than a partnership, and this argument is placed upon the ground that, although there is admittedly a sharing of profits and losses, and community of interest, the agreement does not contemplate that each of the parties shall be the agent for the other. Jackson v. Hooper, 76 N. J. Eq. 185, 74 Atl. 130; Cocks v. Hickman, 8 H. L. Cas. 268. This argument is based upon that provision of the contract which provides that the purchasing, storing, handling, and shipping of the tobacco shall be exclusively within the control of the Bekkedals, and that the sale and disposition of the tobacco shall be exclusively in the hands of the Rosenwalds. It would seem to require no argument to show that, considering the business as a whole, the Bekkedals were to act as agents for the Rosenwalds in the purchasing, storing, handling, and shipping, because the Rosenwalds had a 60 per cent. interest in the tobacco when purchased, and that as to the sales the Rosenwalds were to act as agents of the Bekkedals, the Bekkedals having a 40 per cent. interest in the proceeds of the sales when made. We think the contract in question created a partnership as defined by the Uniform Partnership Act (St. 1919, §§ 1724m—1 to 1724m—38).

Upon the other branch of the case it is argued that, because the sales are made and the proceeds collected entirely without the state of Wisconsin, all of the income of the partnership is derived from business transacted without the state of Wisconsin, and therefore not taxable under the provisions of section 1087m2, subd. 3, which provides that an income tax "shall be assessed, levied and collected upon all income, not hereafter exempted, received by every person residing within the state, and by every nonresident of the state, upon such income as is derived from property located or business transacted within the state." By the provisions of the income tax law the term "income" includes "all profits derived from the transaction of business or from the sale of real estate or other capital assets." This statutory definition gives to the word "income" its ordinary meaning as used in everyday language; that is, that income is a profit or gain derived from capital or labor or from both combined. State v. Nygaard, 163 Wis. 307, 158 N. W. 87, L. R. A. 1917E, 563. Manifestly the total proceeds of the sales of the tobacco covered by the contract in question were not profits, hence not income. In order to determine what the profits transacted under the contract were, it was necessary to deduct from the gross proceeds of the sales made by the Rosenwalds their expenses, and cost of purchasing, storing, handling, and shipping the tobacco incurred by the Bekkedals, and until that

was done no determination could be made as to what was and what was not income, whether that term be used in the statutory sense or in its ordinary business significance. The sales made by the Rosenwalds were one factor, and the purchasing, etc., by the Bekkedals were the other factor, the combination of which produced the profit. Hence to argue that, because the sales were entirely without the state, all of the income was derived from business without the state, when it is conceded that a large part of the business was transacted within the state, is to argue from a false premise. The partnership had an income, at least a part of which was derived from property located or business transacted within the state. The question presented is, Where and to whom was such income properly assessable? By section 1987m22 the situs of income for purposes of taxation is that of its recipient if the recipient be a resident, and if the recipient be a nonresident then the tax shall be assessed, levied, and collected in the district from which the income is derived. Where does the partnership created by the contract of March 6, 1917, reside? It is undisputed that the members of the Bekkedal firm reside in the state of Wisconsin, in the village of Westby, and that the members of the Rosenwald firm reside in the state of New York, and that the partnership business was transacted partly in the state of Wisconsin.

There are cases which hold that a partnership is a legal entity distinct and independent of the persons who compose it. * * * Under the United States Bankruptcy Act of 1898 a partnership is considered as a separate and distinct entity. Tumlin v. Bryan, 165 Fed. 166, 91 C. C. A. 200, 21 L. R. A. (N. S.) 960. On the other hand, under the diverse citizenship clause of the Constitution of the United States a partnership is held for the purposes of that clause to reside in any state where one of the partners resides; that is, a suit begun in the state in which one of the partners resides cannot be removed on the ground of diverse citizenship. While the question has not been directly passed upon, the reasoning of many cases before this court is based upon the theory that a partnership has no entity distinct and apart from the persons who compose it. The partnership in question, therefore, resided equally within the state of New York and within the state of Wisconsin.

It appears without dispute that 40 per cent. of the income of the partnership belonged to the Bekkedals. Under the construction given to the clause "derived from business transacted and property located within the state" in U. S. Glue Co. v. Town of Oak Creek, 161 Wis. 211, 153 N. W. 241, Ann. Cas. 1918A, 421, it is plain that that part of the income belonging to the Bekkedals was taxable within this state; it being derived wholly from property located and business transacted within the state and transactions embodying, as to the Bekkedals, interstate commerce.

As to that portion of the income apportioned under the contract to the Rosenwalds, it is income derived partly from property and busi-

ness within the state of Wisconsin and partly from business transacted without the state of Wisconsin, and it should therefore have been allocated. U. S. Glue Co. v. Town of Oak Creek, 161 Wis. 211, 153 N. W. 241, Ann. Cas. 1918A, 421. As to the Rosenwalds, that portion of the income belonging to them must be treated as partly earned from business transacted for them by an agent; their partner, the Bekkedals, residing within the state of Wisconsin. * * *

Judgment affirmed as modified.

WINSLOW, C. J., and KERWIN, J., took no part.

WHARF v. WHARF et al.

(Supreme Court of Illinois, 1922. 306 Ill. 79, 137 N. E. 446.)

Bill by Eugene C. Wharf against Edith Stone Wharf and others. From an adverse decree, complainant appeals.

CARTWRIGHT, J. In March, 1911, the appellant, Eugene C. Wharf, and James E. Wharf, his father, formed a partnership for the purchase of real estate to be improved and sold for their mutual profit. They purchased 46.24 acres of land on Milwaukee avenue, in Jefferson Park, Chicago, for the purpose of platting it, laying it out in lots, blocks, streets, and alleys, making improvements, and constructing dwelling houses on some of the lots and making sales. They laid out and platted the land in a subdivision called Sunnyside addition to Jefferson Park. Each paid in money aggregating $36,018.57. They constructed a number of dwelling houses and made improvements, such as sewers, pavements, and grading of streets, employed a real estate firm to attend to the selling, and placed the property on the market. They sold all the property on which dwelling houses were erected on the lots. The title to the tract was taken in the names of both partners individually, and in many of the sales the full purchase price was paid and the lots were conveyed to the purchasers. In other sales a portion of the purchase price was paid and a first mortgage was taken to secure the balance, and in other sales second mortgages were taken for deferred payments. Most of the sales were by contract, and as they matured and the amount required was paid deeds were executed. The money received from sales was deposited to the credit of the firm in a bank and all liabilities were paid therefrom, and from time to time there was an equal division of the accumulated funds. James E. Wharf, who lived at Olney, in Richland county, died intestate on October 25, 1921, leaving Edith Stone Wharf, his widow, Eugene C. Wharf, the appellant, Alison J. Wharf, Pauline Rexroat, Nana King, and Edna Kaufman, his children, and Jane Wharf, an adopted minor, his heirs at law.

The appellant filed his bill in equity in the circuit court of Richland county, in which he alleged these facts, and also that at the time of the

death of Wharf the partnership had on hand unpaid first mortgages amounting to $11,900, second mortgages amounting to $16,615 and unpaid contracts of sales of lots amounting to $20,843.44; that there were 58 lots which had not been disposed of and would not be needed for the settlement of the partnership; that the estate of Wharf was being administered in the county court of Richland county by Edith and Alison J. Wharf as administrators; that the appellant was administering the partnership estate for the purpose of winding up its affairs, and had collected the amounts that had come due on mortgages and contracts of sale, paid the debts accruing, and divided between himself and the administrators the balance; that since the death of Wharf two contracts for the purchase of lots had been complied with, and he had executed in the firm name, as surviving partner, and delivered, deeds of conveyance, but in each case before a guaranty policy could be secured he was required to give a bond to hold the insurer harmless in case it was held that he had no power to convey a valid title, and that holders of contracts would be entitled to deeds of conveyance on complying with the terms of their contracts and mortgagors would be entitled to deeds of release.

The prayer of the bill was that it should be decreed that the appellant was vested, as surviving partner, with an undivided half of the 58 lots unsold, free from all dower rights, and the remaining undivided half vested in the heirs at law of James E. Wharf according to the laws of descent of intestate property; that the appellant should be authorized to carry out and complete the contracts of sale, to execute deeds as the purchasers might become entitled thereto, conveying all the legal and equitable title of the partnership in fee simple free of all dower rights, and to release mortgages as the debts secured thereby should be paid.

Edith Stone Wharf, appearing by different attorneys, filed two demurrers, one in her own right and another as administratrix. The guardian ad litem of the minor, Jane Wharf, filed a demurrer, and the other defendants were defaulted. The court sustained the demurrers, and, the appellant having elected to stand by his bill, it was dismissed at his costs, and he appealed.

The appellee Edith Stone Wharf appears in this court in her different capacities as administratrix and in her own right, and is represented by different counsel, who have filed separate briefs and arguments, and the guardian ad litem of Jane Wharf has adopted the brief and argument filed by the widow in her own right.

The questions concerning which the parties are divided are whether the 58 lots remaining and not needed for the settlement of the partnership have passed as real estate to the heirs at law or as personal property, and whether the bill stated any ground of equitable jurisdiction. The partnership was formed to deal in real estate for profit, and the same rules of law apply as in other partnerships where real estate is the subject-matter of a partnership business. In such cases, in the

absence of any different agreement, the real estate is regarded as personal property in order to effectuate the partnership business and the settlement of partnership affairs.

The English rule, established first by judicial decision and more recently by statute, is that real estate is regarded as converted into personalty for all purposes, including not only the partnership business and the settlement of the partnership affairs, but also the succession as between the personal representatives of a deceased partner and the heir at law. The rule of nearly all courts in the United States is that real estate is to be regarded as personal property only for the business of the partnership and the settlement of its affairs, and, when no longer needed for that purpose, the ordinary incidents and quality of real estate revive and the property goes according to the statute of descent. This is a doctrine of reconversion of real estate to its original character, or, rather, that the conversion to personalty is for a temporary purpose only, and when the object ceases the supposed conversion ends.

This court has followed those rules and held that during the existence of the partnership, and until the partnership affairs are settled, the debts paid and all accounts between the partners adjusted, the real estate stands on the same footing as personal property and is not subject to dower or homestead. Bopp v. Fox, 63 Ill. 540; Simpson v. Leech, 86 Ill. 286; Trowbridge v. Cross, 117 Ill. 109, 7 N. E. 347; Parish v. Bainum, 291 Ill. 374, 126 N. E. 129. But the law has also been that the doctrine of survivorship in respect to estates in partnership in real property was limited to the extent to which equity stamps the character of personalty upon such estates, which was as far, and no farther, than they were required to pay partnership debts, and whatever remained of partnership real estate after the debts of the partnership had been discharged was held as tenants in common, subject to dower or curtesy, and went to the heirs of a deceased partner. Strong v. Lord, 107 Ill. 25; Galbraith v. Tracy, 153 Ill. 54, 38 N. E. 937, 28 L. R. A. 129, 46 Am. St. Rep. 867.

That being the state of the law, the Legislature in 1917 passed an act entitled "An act relating to partnerships and to promote uniformity in the law with reference thereto." Laws of 1917, p. 625. The act covered a large scope and contained seven parts, covering the nature of partnership, the relation of partners to persons dealing with the partnership, the relation of partners to one another, the property rights of partners, and the dissolution and winding up of partnerships. The act made material changes in the law of this state relating to partnerships, and it became a law without the approval of the Governor. It purports to be a complete code declaring the law as to all these subjects and makes material changes in the law of this state relating to partnership, but, whatever its intrinsic merits or demerits, it represents the judgment of the Legislature as to the law of partnership.

Related in some way to the question here involved, it contains the following provisions:

In part 2, paragraph 3 of section 8 is as follows:

"(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name."

In part 3, paragraphs 4 and 5 of section 10 are as follows:

"(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

"(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property."

In part 5, clauses (d) and (e) of paragraph 2 of section 25, and section 26, are as follows:

"(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

"(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin."

"Sec. 26. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property."

In part 6, section 31 declares a dissolution is caused "(4) by the death of any partner."

Paragraph 1 of section 38 contains the following:

"(1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his copartners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners."

The provisions that any estate in real property may be acquired in the partnership name and title so acquired can be conveyed only in the partnership name, and that, where the title to real property is in the names of the partners, the conveyance by one partner passes the equitable interest of the partnership, have no relation to the facts in this case, and are only worthy of consideration so far, if at all, as they indicate the nature of the property. The title in this case was not acquired in the partnership name, but was in the names of the partners, and the provision in such a case that a deed by one passes the equitable title to the whole indicates a legal title in the individual partners, and in case of a conveyance by one the other partner, through the equity,

would be compelled to convey his legal title. The provision that partnership land shall not be subject to dower, curtesy, and allowances to heirs necessarily applies to the property of a partner after his death. The provision that on the death of a partner his right in specific partnership property vests in the surviving partner or partners, except when the deceased was the last surviving partner, when his right vests in his legal representative, leads to a conclusion that real property passes on the death of a partner as personalty, since the legal representative would take it as such. The qualification that the legal representative has no right to possess the partnership property for any but a partnership purpose applies to the winding up of the partnership business. The provision that a partner's interest in the partnership is his share of the profits and surplus, and the same is personal property, and that, when dissolution is caused by death, each partner, as against his copartner and all persons claiming through them, in respect to their interest in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities and the surplus applied to pay in cash the net amount owing to the respective partners, is inconsistent with the doctrine heretofore held that upon the settlement of the partnership affairs real estate resumes its original character and descends to heirs. It seems that the legislative intention was to adopt the English rule that real estate which becomes personal property for the purposes of a partnership remains personal property for the purpose of distribution.

There is no dispute of the proposition that the appellant, as surviving partner, is authorized and required to wind up the partnership business, and the statute changes the rule that the doctrine of survivorship in respect to estates in partnership in real property is limited to the extent to which such property is given the character of personalty for the purposes of the partnership and to pay partnership liabilities. The title of his partner in the specific partnership property having vested in him, appellant has a right to convey to purchasers, release mortgages, sell and convey the property, and distribute the proceeds. That being so, the bill states no ground of equitable jurisdiction, but the settlement and accounting are to be in the county court. While the jurisdiction of that court is not exclusive in the settlement of partnership estates (Breckenridge v. Ostrom, 79 Ill. 71), a court of equity will only interfere when there is some equitable ground for such interference.

The decree is affirmed.

Decree affirmed.

Stone, J., dissenting.

CROSSMAN v. GIBNEY.

(Supreme Court of Wisconsin, 1916. 164 Wis. 395, 160 N. W. 172.)

Action by Wilbur Crossman against Nelson Gibney. From judgment for defendant, plaintiff appeals.

This is an action in ejectment brought by the plaintiff to oust the defendant from possession of certain farm lands. The plaintiff owns a farm in Vernon county. On January 5, 1915, he entered into a partnership agreement in writing with the defendant by the terms of which the defendant was to occupy the farm and operate it to conduct the partnership business pursuant to this agreement. For this purpose the plaintiff was also to furnish the seed and a part of the stock, and the defendant agreed to do the necessary work and to furnish a part of the stock. The agreement provides "that the losses and profits shall be equally borne by the parties"; that they shall be deemed in possession of the crops as partners and entitled to the rights and subject, in respect to the business, to the liabilities of partners. The contract further provides that it shall continue for a term of three years from February 1, 1915, and that an accounting shall be made on the 1st day of February of each year, and that defendant's occupancy of the farm shall be deemed the possession of both parties. It contains provisions relative to the payment of the expense of threshing, harvesting, and as to the amount of land to be plowed, and others which need not be repeated here.

On December 31, 1915, plaintiff served on defendant a notice in writing terminating the agreement. The plaintiff's agent and the defendant on about February 1, 1916, adjusted the claims of the parties and settled all of the accounts up to that day except the division of some young stock. On March 8th, 1916, a formal demand in writing was served on the defendant by plaintiff requiring defendant to deliver the premises to plaintiff. The defendant refused to deliver the possession of the farm to plaintiff, and this action of ejectment was commenced soon thereafter.

The trial court held that the parties to the action were partners for the purposes of the business embraced in their written agreement, but the plaintiff was not entitled to prosecute this action in ejectment until an accounting and settlement of the partnership affairs had been had, including a determination of what damages defendant sustained as the result of plaintiff's breach of the partnership agreement, and hence awarded judgment dismissing plaintiff's complaint. From such judgment, this appeal is taken.

SIEBECKER, J. (after stating the facts as above). There is no dispute regarding the facts as stated above, and the only inquiry is whether the plaintiff under these facts and circumstances is entitled to recover possession of his farm from the date the partnership agreement

was terminated, on February 1, 1916, by the written notice of plaintiff of December 31, 1915. The rights of the parties are controlled by the law governing partnership affairs as declared in the "Uniform Partnership Act" (section 1724m1 to section 1724m38, Stats. 1915). Section 1724m26, subd. (2) provides that a partnership dissolution is caused "in contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time."

The only facts in the case operating to show a dissolution of the partnership is the action of the plaintiff by his written notice of December 31, 1915, declaring the partnership agreement terminated as of February 1, 1916. This, under the circumstances, constituted a dissolution of the partnership by the plaintiff in contravention of the agreement. It is not seriously contested but what plaintiff could in law do this, and thereby render himself liable for the damages he caused the defendant as the other member of the partnership. Under this state of affairs the partnership was terminated unless defendant, pursuant to the provision of section 1724m33, continued the business in the same name upon the conditions prescribed therein by subdivision (2), "when dissolution is caused in contravention of the partnership agreement. * * *" The condition prescribed by this statute to enable defendant to continue the business of the partnership for the specified term requires that he apply the partnership property to the payment of plaintiff's interest therein, less the amount of damages plaintiff's termination of the partnership caused defendant, or to secure by bond the payment of the value of plaintiff's interest, less the damages which plaintiff caused defendant by terminating the partnership agreement. There is no showing that defendant has done either of these things or in any manner complied with the law to entitle him to continue the partnership business after the termination of the agreement on February 1, 1916.

It is manifest that the partnership is terminated, and that the defendant has no right to continue the partnership business. Under these circumstances he has no right to remain in possession of the farm under the partnership arrangements. The farm was at no time a partnership asset, and the right to occupy it for carrying on the partnership business ceased at the time the partnership was terminated, namely, February 1, 1916. Under this state of the case defendant had no legal right to withhold possession thereof from the plaintiff. It is no answer to say that because no partnership accounting has been had the plaintiff is not entitled to the possession of his farm. Defendant's right to the possession thereof ceased on February 1, 1916, unless he complied with section 1724m33 for continuance of the business. This he has failed to do. His right to an accounting of the partnership affairs does not vest in him the right to continue in possession of the farm after the partnership ceased. The defendant's right to an accounting, including his claim for damages against plaintiff for disso-

lation of the partnership in contravention of the agreement, and to have the partnership property applied in payment of his claim, including damages, does not include the right to occupy the farm under the terms of the partnership agreement. The necessary consequence is that defendant unlawfully withholds the farm from plaintiff, that plaintiff is entitled to the possession thereof, and hence he is entitled to judgment awarding him possession of the farm and his damages for the unlawful dispossession by the defendant.

The judgment appealed from is reversed, and the cause remanded, with direction that judgment be awarded in plaintiff's favor as indicated in the foregoing opinion.

GILES et al. v. VETTE et al.

(Supreme Court of the United States, 1924. 263 U. S. 553, 44 Sup. Ct. 157, 68 L. Ed. ——.)

Bankruptcy proceeding against Marcuse & Co., alleged bankrupts, on petition of C. B. Giles and others. An order finding that Henry Vette and others were general partners of the firm was revised by the Circuit Court of Appeals (Vette v. Giles, 281 Fed. 928), and the petitioning creditors bring certiorari. Decree of Circuit Court of Appeals affirmed.

Mr. Justice BUTLER delivered the opinion of the Court.

On March 11 and 12, 1920, creditors filed petitions in bankruptcy against Marcuse & Co., and a receiver was appointed. The bankruptcy court found that the firm was composed of Marcuse, Morris, Hecht, Finn, Vette, Zuncker, Regensteiner, Clement Studebaker, Jr., and George M. Studebaker, and sent the case to the referee, directing findings of fact as to insolvency. The case was taken to the Circuit Court of Appeals on petition to review and revise that finding and order. That court eliminated from the order the names of all except Marcuse and Morris. Vette v. Giles, 281 Fed. 928. This court granted a writ of certiorari on petition of creditors, 260 U. S. 712, 43 Sup. Ct. 14, 67 L. Ed. ——. The question for decision is whether any of the persons named, other than Marcuse and Morris, are liable as general partners.

Marcuse had been a member, and Morris had been an employee, of the firm of Von Frantzius & Co., brokers, at Chicago, which suspended business because of the death of Von Frantzius. In April, 1917, settlement of the estate of Von Frantzius was pending in probate court. Proceedings in bankruptcy were pending against Von Frantzius & Co. There were many creditors of the firm, and it was indebted in large amounts to the respondents other than Vette and Zuncker. Marcuse desired to organize a new brokerage firm to carry on business in the place formerly occupied by his old firm. It was proposed that a limited partnership be formed under the Illinois Limited Partnership Act of 1874 (Rev. St. 1874, c. 84, §§ 1–23), and to that end a form of agreement was prepared, and nine originals were signed by Marcuse, Morris, Hecht, Finn, Vette, Zuncker, Regensteiner, and Hoffman (in his own name, but in fact representing the Studebaker interest).

In advance of the consummation of this agreement, Marcuse was to arrange with creditors of the firm that the assets of the Von Frantzius estate be turned over to him, as trustee, on his giving bond and making certain payments for the protection of the administrators. He was to obtain assignments of the claims of creditors, in consideration of trust certificates issued by him containing his agreement to pay off the creditors who did not accept such certificates, to organize a new

partnership, to turn over the assets to the new firm for liquidation in the usual course of its business for account of the certificate holders, and, out of profits accruing to him as a member of the new firm, to pay any deficiency remaining after liquidation of the assets. This arrangement had not been completed at the time of the signing of the partnership agreement. The signed agreements were placed in escrow, not to be delivered until conclusion of arrangements for the delivery to Marcuse of all the assets of Von Frantzius, excepting an amount to indemnify against claims of nonassenting creditors, and to pay the expenses of administration, and until dismissal of the bankruptcy proceedings.

The proposed agreement provided for a limited copartnership under the name of Marcuse & Co., to commence business on April 2, 1917, and to continue for five years. Marcuse and Morris were to be general partners. The other signers were to be limited partners. Marcuse was to contribute a membership in the New York Stock Exchange, in addition to cash and other property. Morris was to contribute $10,000. Contributions were to be made by the limited partners as follows: Hecht $25,000, Finn $31,500, Vette $30,000, Zuncker $25,000, Regensteiner $28,500, and Hoffman (in fact the Studebaker interest) $50,000—amounting in all to $190,000. The general partners were to devote all their time to the business and were permitted to draw specified sums each year to be charged to expenses. Each partner, general and limited, was to have 6 per cent. on capital contributed by him. Morris was to have 10 per cent. of the net profits. There was to be paid to Marcuse 25 per cent. of the net profits, to be used by him to pay off his trust certificates covering the debts of Von Frantzius & Co. The rest was to be divided among the partners, except Morris, in the proportions in which they had contributed capital.

Shortly after the deposit in escrow, Marcuse learned that the New York Stock Exchange would not admit to membership a firm having more than two limited partners, but would not object to a firm having only two limited partners, who were not engaged in other business. This was reported to the others, and the matter of consummating the proposed partnership agreement was dropped.

But Marcuse did not abandon the idea of organizing a new firm, and, after conferences and lapse of some time, another limited partnership agreement for a firm of the same name was prepared conformably to the act of 1874. Marcuse, Morris, Hecht, and Finn were the parties to the new agreement. It was dated—as was the former—April 2, 1917, and was signed June 30 of that year. Marcuse and Morris were general partners and agreed to contribute capital as in the proposed former agreement. Hecht and Finn were named as limited partners, and each agreed to contribute $95,000. The liability of each was expressly limited to the amount contributed by him. The term was five years from July 1, 1917. Rights, duties, and im-

munities of the general and limited partners were substantially as stated in the first draft.

On the same day, and as a part of the same transaction, there was signed an instrument known as the Hecht-Finn trust agreement. The limited partnership agreement was made a part of it, and a copy was attached. It recited that Hecht and Finn would be entitled to certain payments and distributions of income and assets of the copartnership, and declared that they held the same as trustees. The agreement directed payment to the Chicago Title & Trust Company of all funds at any time payable to Hecht and Finn under the partnership agreement, or by way of distribution or dissolution. It directed the trust company to distribute all funds to the holders of certain trust certificates for 380 shares of the initial value of $500 per share to be issued by Hecht and Finn, in accordance with the agreement, as follows: To Hecht 50 shares, Finn 63 shares, Vette 60 shares, Zuncker 50 shares, Regensteiner 57 shares, and Hoffman (for the Studebaker interest) 100 shares. Certificate holders were entitled to have access to the books, to have an inventory and account once a year, and a trial balance monthly. Hecht and Finn were to appoint such auditors as the holders of certificates should designate. On the report of the auditors and the direction of the certificate holders, they were authorized to take steps to dissolve the firm, if the business was not conducted conservatively or was neglected or mismanaged. It was provided that the certificate holders should "have no right, title or interest, directory, proprietary or otherwise, in the said copartnership or in or to the property or assets of said copartnership, * * *" and that "the interest of each * * * holder of trust certificates shall consist solely of the right to receive from the trust company his proportionate share of the net part or parts of the trust fund from time to time actually received by the trust company. * * *" This agreement was signed by Hecht and Finn; there was attached to it an agreement signed by Marcuse, Morris, Hecht, and Finn to do all things necessary to carry out the trust, and the trust company accepted the duties imposed upon it.

On the same day—June 30, 1917—Hecht delivered his check to Marcuse & Co. for $25,000 and Finn his check for $31,500, and checks were delivered to Hecht and Finn by Vette for $30,000, by Zuncker for $25,000, by Regensteiner for $28,500, and by Hoffman (for the Studebaker interest) for $50,000. These checks were handed over to Marcuse & Co., making up a total of $190,000.

On Monday, July 2, the certificate of limited partnership was filed in the office of the county clerk. The new firm commenced business on that day. All the letter heads and other papers of the firm indicated that Marcuse and Morris were general partners and that Hecht and Finn were limited partners. Hecht and Finn took no part in the control of the business. Marcuse and Morris exercised exclusive control and carried on the business. The Hecht-Finn trust agreement

was unknown to persons dealing with the firm. It does not appear that any of the creditors understood or had any reason to believe that the arrangement was other than as shown by the partnership agreement.

From time to time, while it was a going concern, the firm paid dividends on the capital contributed. After bankruptcy proceedings had been commenced against Marcuse & Co., Hecht and Finn, in accordance with section 11 of the Uniform Limited Partnership Act (Hurd's Rev. St. Ill. 1919, c. 106a, § 55), hereafter quoted, renounced their interest in the profits of the business or other compensation by way of income. They also paid $46,000 into court for the benefit of the alleged bankrupt estate. This amount was sufficient to cover all dividends paid on the $190,000, so contributed to the capital of the business, with interest on such dividends from the times of payment.

Are Hecht and Finn liable as general partners?

No limited partnership was formed. On July 1, 1917, the Illinois Limited Partnership Act of 1874 was repealed, and there was substituted for it the Uniform Limited Partnership Act (Hurd's Revised Statutes 1919, c. 106a, §§ 45–75). The Uniform (General) Partnership Act (Id. §§ 1–45) became effective on the same day. The act of 1874 provided that no limited partnership should be deemed to have been formed until the certificate should be filed in the office of the county clerk. The first effort to form a limited partnership was given up. The final effort failed because the certificate was not filed until after the repeal of the act of 1874. Limited partnerships organized under the act of 1917 are not authorized to do a brokerage business, and no attempt was made to organize under it.

Hecht and Finn were not partners as to Marcuse and Morris. It is well settled in Illinois that, as between the parties, the question of partnership is one of intention, to be gathered from the facts and circumstances. Goacher v. Bates, 280 Ill. 372, 376, 117 N. E. 427; National Surety Co. v. Townsend Brick Co., 176 Ill. 156, 161, 52 N. E. 938; Grinton v. Strong, 148 Ill. 587, 596, 36 N. E. 559; Lycoming Insurance Co. v. Barringer, 73 Ill. 230, 233, 234; Smith v. Knight, 71 Ill. 148, 150, 22 Am. Rep. 94. See, also, London Assurance Co. v. Drennen, 116 U. S. 461, 472, 6 Sup. Ct. 442, 29 L. Ed. 688. The Uniform (General) Partnership Act provides:

"A partnership is an association of two or more persons to carry on as co-owners a business for profit." Section 6 (1).

"* * * Persons who are not partners as to each other are not partners as to third persons." Section 7 (1).

"* * * Common property or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property." Section 7 (2).

"The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business. * * *" Section 7(4).

Hecht and Finn did not carry on the business of the firm as co-owners or otherwise. They had no authority, actual or apparent, to act for or bind the copartnership. The agreements of the parties, their subsequent conduct, the repayment of dividends received, with interest, together with the other facts and circumstances above alluded to, are more than sufficient to rebut and overcome any inference legitimately resulting from the receipt of a share of the profits. The provisions of the agreement giving respondents right to have access to the books of the firm, to have statements, to appoint auditors, and, in the events specified, to call for a dissolution, were appropriate in a limited partnership. See section 19, Act of 1874; section 10, Uniform Limited Partnership Act. Under the circumstances, these provisions do not indicate any intent on the part of Hecht and Finn to become general partners, or support petitioners' contention that they are liable as partners.

As to third parties, they cannot be held liable as general partners.

Section 16 of the Uniform (General) Partnership Act provides that:

"When a person * * * represents himself, or consents to another representing him to any one, as a partner in an existing partnership, * * * he is liable to any such person * * * who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable. * * *"

There was no such representation of Hecht or Finn to any person or to the public. On the contrary, they were published to the world as limited partners. It is true that they were not. But no person could have been misled to his disadvantage by the statement that they were. Representation on mistaken belief that they were limited partners was not a holding out as general partners. The lack of power of a limited partnership created under the later act to carry on a brokerage business gives no additional significance to the representations. The firm was not held out as having been organized under that act. The failure to complete the organization did not injure any persons dealing with the firm. Creditors are as well off as if the limited partnership had been perfected. The $190,000 handed over by Hecht and Finn was not withdrawn. Hecht and Finn did not intend or agree to become general partners. The things intended and done do not constitute a partnership. They did nothing to estop them from denying liability as such. The case is not doubtful. But if it were, their intent should be followed. Beecher v. Bush, 45 Mich. 188, 193, 7 N. W. 785, 40 Am. Rep. 465. See also Post v. Kimberly, 9 Johns. 470, 502, et seq. To hold them liable as general partners would give creditors what they are not entitled to have, and would impose on Hecht and Finn burdens that are not theirs to bear.

Moreover, we think that section 11 of the Uniform Limited Part-

nership Act was applicable, and was properly invoked by Hecht and Finn. It provides:

"A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

Prior to the taking effect of that act, the courts of Illinois held that at common law all partners were liable without limitation for the debts of the firm, and that, in order to limit such liability, the statute authorizing limited partnerships must be complied with, or all those who associated under it would be liable as general partners. Henkel v. Heyman, 91 Ill. 96, 101; Manhattan Brass Co. v. Allin, 35 Ill. App. 336, 341; Walker v. Wood, 69 Ill. App. 542, 549, affirmed 170 Ill. 463, 48 N. E. 919; Cummings v. Hayes, 100 Ill. App. 347, 353. And this is in harmony with decisions elsewhere under statutes similar to the Illinois act of 1874. Pierce v. Bryant, 5 Allen, 91, 94; Haggerty v. Foster, 103 Mass. 17; Argall v. Smith, 3 Denio, 435, affirming Smith v. Argall, 6 Hill, 479, 481; Durant v. Abendroth, 69 N. Y. 148, 152, 25 Am. Rep. 158; In re Merrill, 12 Blatchf. (U. S.) 221, 223, Fed. Cas. No. 9,467; Richardson v. Hogg, 38 Pa. 153; Vanhorn v. Corcoran, 127 Pa. 255, 268, 18 Atl. 16, 4 L. R. A. 386; In re Allen, 41 Minn. 430, 43 N. W. 382; Lineweaver v. Slagle, 64 Md. 465, 483, 2 Atl. 693, 54 Am. Rep. 775; Holliday v. Union Bag & Paper Co., 3 Colo. 342, 344; Oglesby v. Lindsey, 112 Va. 767, 776, 72 S. E. 672, Ann. Cas. 1913B, 913. These cases illustrate how strictly the common-law rule against limitation of liability was applied, and how far the doctrine of constructive partnership was carried. It was thought that the strictness of the old act and decisions under it impaired the usefulness of limited partnerships as business organizations because of the risk that one contributing capital as a limited partner might be held liable without limitation. See explanatory note as to the Uniform Limited Partnership Act, submitted with the act to the Illinois Legislature. The Uniform Limited Partnership Act and the Uniform (General) Partnership Act, passed at the same time, relax the strictness of the rules against limitation of liability. Each provides that the rule that statutes in derogation of the common law are to be strictly construed shall have no application to it, and that the act shall be so interpreted and construed as to effect the general purpose to make uniform the laws of those states which adopt it. See section 28, Uniform Limited Partnership Act (Hurd's Rev. St. 1919, c. 106a, § 72); section 4, Uniform (General) Partnership Act.

Hecht and Finn contributed to the capital of the business, and

each erroneously believed that he had become a limited partner in a limited partnership. Neither took any part in the control of the business or exercised any rights or powers in respect of it, other than those which might belong to one not a general partner. See section 19, Act of 1874; section 10, Uniform Limited Partnership Act. They made the renunciation provided for. No person suffered any loss or disadvantage because it was not made earlier, or because of reliance on any statement in the certificate. All dividends paid on the $190,-000 were returned. It need not be decided whether such return was necessary.

Section 11 is broad and highly remedial. The existence of a partnership—limited or general—is not essential in order that it shall apply. The language is comprehensive, and covers all cases where one has contributed to the capital of a business conducted by a partnership or person erroneously believing that he is a limited partner. It ought to be construed liberally, and with appropriate regard for the legislative purpose to relieve from the strictness of the earlier statutes and decisions. See Logan v. Davis, 233 U. S. 613, 627, 628, 34 Sup. Ct. 685, 58 L. Ed. 1121; United States v. Colorado Anthracite Co., 225 U. S. 219, 223, 32 Sup. Ct. 617, 56 L. Ed. 1063; United States v. Southern Pacific Railroad Co., 184 U. S. 49, 56, 22 Sup. Ct. 285, 46 L. Ed. 425. Its application should not be restricted to cases where there was an attempt to organize a limited partnership under that act.

The petitioners assert that section 11 does not apply because the limited partnership certificate filed July 2, 1917, was false, in that it did not disclose the names of all the limited partners or the amount of the contributions of each. Their contention is that the other respondents were represented by Hecht and Finn, and that all should have been named in the certificate as limited partners, and that the amount advanced by each of the respondents should have been stated as his contribution to the capital. But the act of 1874 was repealed and the Uniform Limited Partnership Act was substituted for it before the certificate was filed and before the firm commenced business. Section 8 of the act of 1874 provides that:

"If any false statement shall be made in such certificate * * * all the persons interested * * * shall be liable * * * as general partners."

The later act is very different. It provides (section 6):

"If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false."

We do not find that the certificate was false within the meaning of section 8. But even if it was inaccurate or false as asserted, liability of Hecht and Finn or the other respondents as general partners does not follow, because the act of 1874 was superseded, and because it is not shown that any creditors suffered loss by reliance upon any statement in the certificate.

It must be held that Hecht and Finn are not liable as general partners.

Petitioners contend that the respondents other than Hecht and Finn are liable as general partners. They argue that, in the attempt to form the limited partnership under the agreement signed June 30, Hecht and Finn were acting as the representatives of the other respondents; that the earlier agreement, signed by all and placed in escrow, was not abandoned; and that the limited partnership agreement and the Hecht-Finn trust agreement signed June 30 were calculated and intended to circumvent the rule of the New York Stock Exchange above referred it, without altering the substance of the plan of organization evidenced by the first agreement. But from the conclusion that Hecht and Finn are not liable as general partners, it necessarily follows that the other respondents cannot be held liable as such.

The decree of the Circuit Court of Appeals is affirmed.

LAFLIN & RAND POWDER CO. v. STEYTLER et al.

(Supreme Court of Pennsylvania, 1892. 146 Pa. 434, 23 Atl. 215, 14 L. R. A. 690.)

Assumpsit by the Laflin & Rand Powder Company against J. J. Steytler and others, doing business as the Youghiogheny Coal Company, Limited. Judgment for plaintiff. Defendants appeal.

MITCHELL, J.[7] The limited association act of 2d June, 1874, was a wide departure from the principles of the common law governing partnerships and the liability of the individual partners to the firm creditors. It was not the first, nor has it been the last, of such changes. On the contrary, it is but one step in a line of concessions to the business views and habits of a commercial age and community, and it should be construed in the spirit of its enactment. A review of the course of legislation may help us towards the true intent of the statute. The act of 21st March, 1836, (P. L. 143,) was an elaborate scheme for the introduction of a new kind of partnership, not previously known to the law. One or more general partners were required, and they alone were authorized to transact the business or sign the firm name, and their names alone, without the word "company" or other general term, could appear in the firm title. The special partners must contribute actual cash as part of the capital, could not withdraw any part of it during the term, nor receive profits, or even interest, which lessened its amount, and any violation of these provisions, or any participation in the transaction of the business with the public, or the appearance of their names in the firm title, subjected them to be treated as general partners. A certificate of the facts had to be sworn to, acknowledged in the manner of acknowledgment of deeds, and recorded, before the partnership was legally constituted; and any change as to any fact set forth in the certificate must be again certified in like manner on penalty of liability of all parties as general partners.

The influence of common-law ideas of partnership is apparent throughout the act. It was manifestly regarded as an experiment, to be entered upon cautiously and hedged about with restrictions. But the act met the needs of the community, and, in the language of the present hour, it had come to stay. After more than half a century, it is still on our statute book as the basis of the system, and every change since has been a step forward in the same direction, and not backward. By joint resolution of 16th April, 1838 (P. L. 691), a partner, general or special, or his executor, in case of his death, could, with the assent in writing of the others, sell and assign his interest without causing a dissolution, such alterations being certified, etc., as before. By the act of 21st April, 1858 (P. L. 383), the sale of a partner's interest, or an increase of the capital, either by increased contributions from the original partners, or by taking in new special partners, could

[7] Part of the opinion is omitted.

be provided for in advance in the articles of partnership or in a separate instrument, such changes being required to be certified and recorded as before; but, most notable of all, the omission to record was not to work a dissolution as before, or subject the special partners to general liability. The spirit of progressive legislation had discovered that changes which left the business intact, or even increased in capital, did not demand the punishment of special partners by imposing general liability for neglect of mere formalities.

The act of March 30, 1865 (P. L. 46), made two important further changes: The firm title, where there were more than two general partners, may contain the words "and company" (previously forbidden), the names in full of all the partners, special as well as general, being put upon a sign; and the special partners were allowed to contribute their share of the capital in goods, the value, however, being first appraised under oath by an appraiser appointed by the court of common pleas. By the act of 21st February, 1868 (P. L. 42), the firm name may consist of the name of any one general partner, with the addition "and company," notwithstanding the name may be common to such general partner, but the sign must be put up as required by the act of 1865. This was the state of the law when the legislature passed the act of 2d June, 1874 (P. L. 271), for the formation of partnership associations with limited liabilities, under which the present defendants were organized. By this act no general partners are required, nor is any restriction put upon the firm name or title, except that the word "limited" must be the concluding word. The persons desiring to form the association must sign and acknowledge a statement setting forth, inter alia, "the full names of such persons." The act speaks only of "subscribing and contributing capital," total amount, "and when and how to be paid," etc. But this being held to mean money capital only, a supplement was passed 1st May, 1876 (P. L. 89), authorizing contribution "in real or personal estate, mines, or other property, at a valuation to be approved by all the members."

The act of 1874, it will be seen, was not a mere amendment or supplement to anything that went before, but, like the act of 1836, a new scheme, carefully and elaborately drawn, creating a new kind of artificial person, standing between a limited partnership as previously known and a corporation, and partaking of the attributes of each. It was, however, a step forward in the same line of legislative recognition of business demands uniformly pursued since the start, in 1836.

With this review, we may now turn to the two points especially involved in the present case. * * *

The act of 1874, as already said, made no restrictions upon the firm title, except the compulsory termination "limited," and omitted the requirement of the sign, but in lieu thereof substituted the statement containing the "full names" of the persons composing the association. This phrase was borrowed from the act of 1865, and its intent was the same in both—to secure the identification of the individual by hav-

ing his name plainly set forth in the full form by which the community would recognize him. The appellants gave evidence that the names assigned to the statement were in the form habitually used by them in business, and by which they were generally known in the community. This, if proved, was a sufficient compliance with the statute.

The act of 1836 required the special partners to contribute actual cash, and for nearly 30 years this requirement was absolute and unyielding. The act of 1865 for the first time permitted goods to be put in as capital, but required their value to be fixed by a sworn appraiser appointed by the court. The act of 1874, as amended in 1876, did away with all these restrictions, and allowed the capital to be contributed in "real or personal estate, mines, or other property," without any other check as to the valuation than the agreement of all the subscribers. The statement is to certify the kind of capital contributed, whether money or property, and, in the latter case, a schedule with a description and valuation. By the plain terms of the act the valuation is in the discretion of the parties, and (assuming, of course, good faith) may be sanguine or cautious. Rehfuss v. Moore, 134 Pa. 462, 19 Atl. 756. The description, therefore, is plainly for the information of parties interested, so that they may, if they desire, have the data for their own judgment of value. Accordingly it has been uniformly held by this court that a vague or general or lumping description is not sufficient. Maloney v. Bruce, 94 Pa. 249; Vanhorn v. Corcoran, 127 Pa. 255, 18 Atl. 16.

It is not intended, however, nor would it be practicable in many cases where an existing business is the basis of the new firm, to require minute specification of details that may change from day to day. Certainty to a fair business intent is the safe, practical criterion, as was indicated in Rehfuss v. Moore, 134 Pa. 462, 19 Atl. 756, where a lumping valuation of six distinct patent rights, at a very high figure, was sustained on the ground that they were all expected to be used in the operation of a single device, embodying the principle of all, and were considered valuable only in combination. The schedule in the present case described several tracts of land which it appears were acquired by different titles, but which had been merged together, and formed into a coal works called the "Buffalo Mines." The schedule valued them as one tract. It also set out certain buildings, tenement houses, engines, etc., in considerable, but not minute, detail, valuing each item separately, but as a part of one entire plant, for the operation of coal mining. It is claimed that the various items of property are sufficiently specified and described for a creditor or the sheriff to go upon the land and identify or levy upon them. This was sufficient. The act expressly mentions "mines" as the subject of contribution as capital, and it cannot be intended that every pick and shovel or mule and harness should be specified and valued separately. A fair business description of the mine and its equipment is all that the statute requires.

Judgment reversed, and venire de novo awarded.

CARTER v. PRODUCERS' OIL CO., Limited.

(Supreme Court of Pennsylvania, 1897. 182 Pa. 551, 38 Atl. 571, 39 L. R. A. 100.)

Suit by John J. Carter against the Producers' Oil Company, Limited. Decree for defendant. Plaintiff appeals.

The following is the opinion of the court of common pleas:

"I have found as a fact that the plaintiff is the bona fide owner of the stock which he seeks by his bill to have transferred to him. In so doing, I have negatived so much of paragraph c of the defendant's 5th proposition of law as avers that the plaintiff has not overcome the responsive denial of the answer as to the bona fides of his ownership. The proof of ownership offered by the plaintiff consisted of the production of the certificates issued by the Producers' Oil Company, Limited, evidence establishing their genuine character, and the due execution by the holders thereof of the transfers printed on the back of the certificates. To this was added his own testimony that he purchased the shares from the National Transit Company, and paid for the same in cash with his own money, and that no other person had any interest therein. He produced the check by which payment was made, the receipt of the National Transit Company, and other documents corroborating his testimony. This was certainly enough, in the absence of countervailing proof, to establish his unqualified ownership against the general and vague denial of the answer.[8] * * *

"I turn, therefore, to the questions raised upon the undisputed facts by the plaintiff's 1st, 2d, 3d, 4th, 5th, 7th, 8th, and 10th, and the defendant's 1st, 2d, 3d, and 4th, propositions of law. Under the law governing 'partnership associations' formed under the act of June 2, 1874, and its amendments, and the agreement, rules, and regulations governing the Producers' Oil Company, Limited, is a member of that company who purchases additional shares entitled to represent such additional interest in the capital in the meetings of the company, without being elected to membership in respect to such additional interest? The fourth section of the act of June 2, 1874, as amended by the act of 25th of June, 1885, provides as follows: 'Section 1. Interests in such partnership associations shall be personal estate, and may be transferred, given, bequeathed, distributed, sold or assigned, under such rules and regulations as such partnership associations shall, from time to time, prescribe by a vote of a majority of the members in number and value of their interests, and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such

[8] That portion of the opinion in which the court concluded that the fact that plaintiff may have sought control for the purpose of conducting the business in conformity with the policy of the Standard Oil Trust did not defeat his right to the relief prayed is omitted.

association, unless elected to membership therein by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy or otherwise, which occurs in the absence of any rules and regulations of such associations regulating such transfer, and which is not followed by election to membership in such associations, shall entitle the owner or transferee only to the value of the interest of the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisement shall be subject to the approval of said court.' The provisions of this section affecting the status of transferees of interests are only operative in the absence of rules and regulations prescribed by the association by a vote of a majority of the members in number and value of their interests. June 5, 1894, over a year before the plaintiff purchased any of the shares involved in this controversy, the Producers' Oil Company, Limited, in the manner prescribed by the act, and also in conformity with the provision in the rules governing amendments thereto, adopted the amended rule set forth in the findings of fact. It is conceded that this rule, if valid, is conclusive against the rights claimed by the plaintiff in his bill. But it is contended that the rule is invalid, because no authority to make such a rule is given by the statute, because it is against the terms of the statute, and because it is in restraint of trade, in derogation of the rights of the members, and unreasonable in its provisions.

"The provision forbidding sales of shares except to a particular class of persons, and that requiring a member purchasing additional shares to be elected to membership in respect to such shares, are independent; either may stand though the other fall. The plaintiff, although he had never been lawfully expelled from membership in the P. P. A., was not at the time he purchased this stock qualified for membership therein by reason of his business associations with the Standard Oil Trust. But the first clause of this rule deals with the right of a member to sell and not to buy. No member of the company sold his stock to the plaintiff; nor are we able to determine whether or not the persons to whom they did sell were or were not qualified under this clause. We pass it by, therefore, to consider the last paragraph of the rule, which specifically covers the case in hand. Many cases are cited for the plaintiff to show that the right of a corporation to make by-laws for the regulation of transfers of stock does not include the right to place restrictions upon transfers. For the protection of the corporation, its stockholders and creditors, it may prescribe, by by-laws, the mode of transfer; but it cannot, without express authority in the charter, impose restrictions upon the free alienability of its shares, which is an incident of such property. The argument, however, fails when it is attempted to apply it to a 'partnership association'; for it is quite

clear that the rules and regulations authorized by the act of 1885 are intended to govern more than the mere mode of transferring shares, and to embrace the status of a transferee in respect to the association. The language is: 'Interests may be transferred, given, bequeathed, distributed, sold or assigned under such rules and regulations as such partnership association shall from time to time prescribe.' And as the act prescribes, not the manner of registering transfers, but the status of a transferee who has become the owner of an interest in the capital by gift, bequest, distribution, sale, assignment, or other mode of transfer, only in the absence of rules and regulations, it is necessarily implied that these rules and regulations, which are to take the place of the statutory provisions, may cover the same subject; and this is precisely what the first sentence of this section declares. If the association may not make rules and regulations covering the status of transferees as well as the manner of transfer, it follows that, in every association having rules and regulations governing the formal transfer of interests, any transferee becomes immediately a member without election, for the statute operates only in the absence of rules and regulations. Every association, if this be a correct construction of the law, will be required to choose between doing business without any rules at all governing the transfer of shares and the loss of all control over the membership through the adoption of such rules.

"It is quite too clear for argument that the power of partnership associations under the statute to make rules and regulations extends to the general subject of the status of transferees, and the manner in which they may become members, as well as to the mode of transfer; and the question is therefore narrowed to this: Is the provision requiring members of the company purchasing additional shares to be re-elected in respect thereto within this general power, or is it void as against the spirit and intention of the law? Whether the partnership association ought to be classified by the professor of legal science as a species of the genus corporation, or the genus partnership, or whether it should be set apart as a new genus, seems to me unimportant. If a corporation, it is so peculiar in its features that the general law of corporations cannot be applied to it without important modifications; if a partnership, it so differs from the common type that the general law of partnerships is but slightly applicable. Both the law of corporations and the law of partnerships are to be resorted to in the absence of statutory regulations, the choice being determined by the nature of the feature under consideration. In the present case we derive little assistance from either. The general rule of corporations invoked by the plaintiff has been laid down to meet the conditions existing in corporations in which the ownership of stock carries with it ipso facto membership in the corporate body. If there are corporations in which the conditions are different, it is manifest that the rule is inapplicable to the extent of the difference.

"The delectus personarum as it exists in partnerships grows out of the contract of the partners to be associated with each other, and with no others. The reason for it is found in the right of each partner to act as agent for all the others, the liability of each for the partnership obligations, and the right of each to contribution from the others. None of these conditions exist in partnership associations. The case of a transfer of interest from one partner to another is not analogous to the case in hand, for the dissolution is caused in such a case, not by the addition to the interest of one of the partners, which adds nothing to his power, but by the dropping out of the assigning partner, whose continuance is necessary to the partnership existence. A partnership association differs from the common type of partnerships in that the members vote, and do not act with the powers of partners, and in that they are subject to no joint liability. It differs from the common type of corporations in that the members have a right to admit or refuse membership in the company to the transferee of the interest, as well as in some other particulars. In determining whether the act of 1885 should be strictly construed against the power of the association to limit the right of one of its members to acquire control by increasing his interest, we ought to look to the spirit and intention of the act. The peculiar form of delectus personarum, so carefully guarded in partnership associations, cannot be based upon the same consideration which gives rise to the common form in partnerships, for there is no mutual agency, no joint liability. Looking at the general scheme of the act, it seems apparent that it was intended to enable persons desiring to combine their capital in any business enterprise to do so without incurring, on the one hand, the general liability of partners, or, on the other, the risk of having the business taken out of the control of those in whom it was originally placed without their consent, which exists in ordinary corporations. If this be true, it is manifest that transfers of interests from one member to another are within the mischief sought to be prevented, for the members vote by value of interest as well as number upon most important questions.

"If the case of a member transferee is not included within the provisions of the statute, it is not because the letter of the law does not include it, but because the court is moved by the context to limit its literal meaning. 'Interests,' the act declares, without indicating any exception, 'may be transferred * * * under such rules and regulations as such partnership association shall from time to time prescribe,' etc. 'Any change of ownership which occurs in the absence of any rules and regulations of such associations regulating such transfer * * * shall entitle the owner or transferee,' etc. But the term 'election to membership' is not happily chosen to express the consent of the members to the acquisition of a greater interest by one of their number. One who is already a member cannot be, in any proper sense of the term, elected to membership. The broad and general terms used in the act, together with the use of this phrase, inappropriate to the

case of transfer between members, indicate that the particular case of such transfer was not present in the legislative mind. Had it been, the general terms would have been modified if it were intended to exclude it, and some modification of the term 'elected to membership' would have been made had the intention been specifically to include a transfer to one already a member. We can only ascertain the legislative will in a particular case by determining whether or not it falls within the general intention expressed in the law. And, while my mind inclines to the belief that such a case was not within the intention of the legislature, it is not without much doubt and some hesitation that I so decide. But it seems clear to me that the power of the association to regulate the status of transferees of interests in capital is not limited by the regulations prescribed by the act. In conferring upon the association authority to legislate for itself, it is implied that it may make rules which differ from those prescribed in the act. If the case of a transfer to one already in the membership be not included in the terms of the act, it is, at most, an omitted case, which the association itself may provide for. The rule adopted by the defendant is not against the terms of the act, for, at best, the act does not cover it at all. Nor is it unreasonable, for it is in line and harmony with the general spirit and intention of the act. Nor does it infringe any right of the members, for the owners of the shares may still freely sell them to whom they please, the only difference being that a sale to a member is put in the same category as a sale to other persons. No member can claim a vested right to a greater voting power than was given him by the articles of association. The full value of the interest is guarantied to the purchaser in any event.

"Thus far we have considered the rules and regulations of the defendant as mere by-laws, imposed by a majority under the authority of the statute. The original rules were, however, agreed to and signed by all the members at the time the company was organized, and as part of its organization. They have therefore the effect of articles of association additional to the certificate filed as required by law. The plaintiff had notice of them, both actual and constructive. He is therefore bound by this agreement, and one of its provisions is that it may be altered by a vote of the majority of the members in number and value of their interests. It was so altered long prior to his purchase of the shares in question, no vote being against it except his own. Conceding that the authority thus given to alter cannot be carried so far as to permit a change in the general scope of the instrument; that no change can be made against the mandate of positive law, or contrary to the certificate of association, or which is unreasonable or oppressive, —still, I think, this alteration is not an undue exercise of the power, for the same reasons which have been already adverted to, and which, considered in this aspect, are still more forcible and cogent.

"Being of opinion that the last clause of rule 25, which excludes the plaintiff from participation in the business and profits of the defend-

ant in respect to the shares purchased by him until he shall be elected to membership in respect to such shares by the majority of the members in number and value of their interests, is valid, it follows that he is not entitled to the relief prayed for in his bill. His counsel in the argument distinctly disclaimed any desire to have the stock transferred upon the books of the company unless such transfer carried with it the right to vote and participate in the profits; and hence we do not consider the question whether so much of the relief prayed for might not properly be granted on the facts disclosed.

"It remains to consider the case for affirmative relief presented by the defendants upon their cross bill. At the time the plaintiff presented the certificates for 13,013 shares to the secretary of the company, and had new certificates issued to himself for the same, he was not, in fact, the owner of the interest represented by the certificates. He, in effect, represented himself to be owner by presenting them indorsed as they were in the usual form, and demanding the transfer to himself. But he is now the owner of the same shares by a subsequent purchase. And the National Transit Company, which was at the time owner, is clearly estopped by its own acts from asserting that ownership as against the defendant. We are required to note a difference here between partnership associations and ordinary corporations. In the latter the transfer of stock on the books invests the transferee with the full rights of a stockholder, including the right to vote the stock and to receive the dividends. In the former this right does not follow the transfer on the books, which is a merely ministerial act of an officer or clerk, but is obtained only by election to membership by the members of the company. We have held in the principal case that the plaintiff cannot participate in the business or profits of the defendant company as to purchased stock without re-election, and it follows that no clerk or officer can confer that right upon him by permitting a transfer upon the books. Apart from membership, and pending the appraisement of the value of the interest, or the sale of it to another who may be acceptable to the remaining members, it may be important, and it seems to me it is quite proper, that the interest should stand on the books of the company in the name of the true owner, both for its protection and his own. If we now grant the relief prayed for in the cross bill, we shall restore the interest owned by the plaintiff on the books of the company to the names of the original members, and invest them with an apparent right to dividends and participation in the business to which they are not entitled, and which might be an injury to all concerned. The books of the company defendant do not show that the plaintiff is entitled to vote or participate in profits in respect to these shares, and it can therefore suffer no injury from an unauthorized transfer. Let a decree be drawn dismissing both the plaintiff's bill and the cross bill filed by the defendant, at the costs of the plaintiff; and, at the time of settling the decree, the court will hear either party upon

any exceptions to the findings of fact or of law which they may file, respectively, within 10 days after notice of the filing of this opinion."

McCollum, J. We think the court below entered the proper decree in this case. * * *

Decree affirmed, and appeal dismissed, at the cost of the appellant.

EDWARDS v. WARREN LINOLINE & GASOLINE WORKS, Limited.

(Supreme Judicial Court of Massachusetts, 1897. 168 Mass. 564, 47 N. E. 502, 38 L. R. A 791.)

Action by one Edwards against the Warren Linoline & Gasoline Works, Limited, in which the Walworth Manufacturing Company was summoned as trustee. From a judgment discharging the trustee, and dismissing the action, plaintiff appeals.

Lathrop, J. It is conceded by the plaintiff that as the jurisdiction of the court depends upon charging the Walworth Manufacturing Company as trustee, inasmuch as there was no service upon the principal defendant, the action was properly dismissed upon discharging the trustee. The question, then, is whether the trustee was properly discharged, and this depends upon whether the principal defendant, an association formed under the laws of the state of Pennsylvania, is a partnership or a corporation. The trustee's answers to interrogatories refer to Brightly's Purd. Dig. (12th Ed.) 1086–1088, and to the cases, of Eliot v. Himrod, 108 Pa. 569, and Sheble v. Strong, 128 Pa. 315, 18 Atl. 397, as containing the law relative to the statement in the answer that the principal defendant was a partnership, and not a corporation. From the Digest it appears that such an association is styled a "partnership association," and not a corporation. By the terms of the various acts which have been passed upon the subject, such an association may be formed by three or more persons. The capital is alone to be liable for the debts. There is no personal liability of the members, except to the extent of any unpaid subscription, if certain provisions of the act are complied with. "Interests in such partnership associations" are declared to be personal estate, and are transferable, under such rules and regulations as shall from time to time be prescribed; but, if there are no such rules and regulations, the transferee of any interest in any such association is not entitled to any participation in the subsequent business of the association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. The business is to be conducted by a board of managers. The duration of the association may be fixed by the articles of association, but is not to exceed 20 years. Power to adopt and use a common seal is given in case the association has occasion to execute a deed of conveyance or bonds

and mortgages. Land sold to the association, or by it, is required to be conveyed in the name of the association. It is further provided: "Said association shall sue and be sued in their association name; and, when suit is brought against any such association, service thereof shall be made upon the chairman, secretary, or treasurer thereof, which service shall be as complete and effective as if made upon each and every member of such association."

In Eliot v. Himrod, 108 Pa. 569, 580, it is said by Mr. Justice Trunkey, in delivering the opinion of the court: "The formation of a limited partnership association is materially different from the creation of a corporation. Such association is treated in the statute as a partnership, which, upon the performance of certain acts, shall possess specified rights and immunities. In contemplation that the association may consist of many members, for convenience it is clothed with many of the features and powers of a corporation, such as the right to sue and be sued, grant and receive, in the association name. But no man can purchase the interest of a member, and participate in the subsequent business, unless by a vote of a majority of the members in number and value of their interests. No charter is granted to the persons who record their statement." Sheble v. Strong, 128 Pa. 318, 18 Atl. 397, is to the same effect.

If the question presented were an open one in this commonwealth, it might well be held that such an association could be considered to have so many of the characteristics of a corporation that it might be treated as one. At common law, a joint-stock company formed for business purposes is considered in this commonwealth merely as a partnership. Tappan v. Bailey, 4 Metc. (Mass.) 529; Tyrrell v. Washburn, 6 Allen, 466. The same rule has been applied to joint-stock associations formed under the laws of the state of New York, which do not differ, in any essential respect, from the laws of Pennsylvania. Taft v. Ward, 106 Mass. 518, 111 Mass. 518; Bodwell v. Eastman, 106 Mass. 526; Gott v. Dinsmore, 111 Mass. 45, 51; Railroad v. Pearson, 128 Mass. 445. See, also, Frost v. Walker, 60 Me. 468; Dinsmore v. Railroad, 32 Leg. Int. 388, 11 Phila. 483, and Fed. Cas. No. 3,921. In Taft v. Ward, 106 Mass. 518, 524, speaking of the New York statutes, it was said by Chief Justice Chapman: "These statutes provide, in substance, that any association consisting of seven or more shareholders or associates may sue and be sued in the name of the president or treasurer; that in such suit a judgment may be rendered against the company; and until an execution is issued against the company and returned unsatisfied, no action shall be maintained against individuals. These statutes seem to apply to all co-partnerships consisting of seven or more members. The members of such companies are authorized to hold their interests in shares, which are assignable like shares of stock in a corporation, and the action against the members is regarded as supplementary to the action against the company. Waterbury v. Express Co., 50 Barb. 157; Robbins v.

Wells, 1 Rob. (N. Y.) 666. So far as these statutes relate to the procedure in courts for the recovery of debts, they are limited to the state of New York; for each state adopts its own forms of remedy. Story, Confl. Laws, §§ 556–558. The plaintiff could not in this commonwealth bring an action against the president or secretary, and obtain a judgment against the company by its name; nor could he bring an action against the members, or any of them, as a supplement to such an action. In order to do so, we must hold that the statutes of New York prescribing forms of action are in force here. In this commonwealth, such a company is a mere co-partnership." There is nothing inconsistent with an association being a partnership that it has shares, or that the shares are transferable, or that the death of a member shall not work a dissolution of the partnership. Phillips v. Blatchford, 137 Mass. 510. See, also, Hoadley v. County Com'rs, 105 Mass. 519; Gleason v. McKay, 134 Mass. 419.

The case mostly relied on by the plaintiff is Liverpool Ins. Co. v. Massachusetts, 10 Wall. 566, which was taken to the supreme court of the United States on a writ of error from this court. See Oliver v. Insurance Co., 100 Mass. 531. It was a bill in equity, filed by the treasurer of the commonwealth, under St. 1862, c. 224, § 11, to restrain the defendant from prosecuting its business, until the tax assessed upon it by section 2 of the statute had been paid. This section provided that "each fire, marine, and fire and marine insurance company incorporated or associated under the laws of any government or state, other than one of the United States," should annually pay a certain tax. The defendant was an English company, formed for the business of insurance, and organized under a deed of settlement. Its property was divided into transferable shares. It had power to sue and be sued by the name of its chairman, and a suit did not abate by reason of the death of such officer. The company could sue its own members, and be sued by them. Execution on any judgment recovered against the company could be issued against any proprietor. The statute under which it was formed, and subsequent statutes, declared that it should not be deemed to be incorporated. The company was composed in part of British subjects, and in part of citizens of the state of New York. This court, after stating that it was not a pure corporation nor a pure partnership, but was an association intermediate between corporations known to the common law and ordinary partnerships, and was so far clothed with corporate powers that it might be treated, for the purposes of taxation, as an artificial body, proceeded to say: "We think the defendants are an association of the kind to which the statute of 1862 was expressly intended to apply, as well as to bodies wholly corporate in their character; and that, being permitted by the comity of our laws to exercise their functions within this commonwealth, they can claim no exemption from regulations appropriate to their collective action on account of the citizenship or nationality of their individual members." In the supreme

court of the United States the decree of this court was affirmed, on the ground that the company was a foreign corporation; but Mr. Justice Bradley, while agreeing in the result, differed on the question whether the company was a corporation. He was of opinion that it was one of those special partnerships called "joint-stock companies," and that it could not sue or be sued in this country without legislative aid. This view of Mr. Justice Bradley is in accord with the view of this court, and we are not aware that the view taken by the supreme court of the United States has been followed in this commonwealth. The decisions which we have already cited show that a foreign joint-stock company is considered as an association or partnership, and not as a corporation.

An examination of the statutes further shows that the legislature has clearly recognized the distinction between foreign corporations and associations; and that, where it has deemed it best that an act should apply to an association as well as to a corporation, it has said so in plain language. Thus, St. 1882, c. 106, relating to the taxation of foreign mining, quarrying, and oil companies, and requiring the appointment of an agent here, upon whom process may be served, uses the language "every corporation, company, or association." St. 1887, c. 214, in section 1, provides: "When consistent with the context, and not obviously used in a different sense, the term 'company' or 'insurance company,' as used herein, includes all corporations, associations, partnerships or individuals engaged as principals in the business of insurance." The language is the same in St. 1894, c. 522, § 1. By St. 1888, c. 429, § 11, "fraternal beneficiary corporations, associations or societies," organized under the laws of another state, and then doing business here, were allowed to continue business without incorporating under the act. But by St. 1892, c. 40, § 1, this was amended by striking out the words "associations or societies." St. 1884, c. 230, requires "every corporation established under the laws of any other state or foreign country," and hereafter having a usual place of business here, before doing business, to appoint in writing the commissioner of corporations, or his successor in office, to be its true and lawful attorney, upon whom process might be served. St. 1888, c. 321, allows "manufacturing corporations established under the laws of other states," which have complied with the provisions of St. 1884, c. 330, to purchase and hold such real estate here as may be necessary for conducting their business. By St. 1895, c. 34, "foreign corporations engaged in the business of selling or negotiating bonds, mortgages, notes or other choses in action" are made subject to the provisions of St. 1884, c. 330. St. 1896, c. 391, contains a provision relating to the personal liability, under certain circumstances, of the officers and members or stockholders in any corporation established under the laws of any other state or other country. See, also, St. 1895, c. 157. Many other instances of legislation might be given

where the distinction between a corporation proper and a mere association or organization is shown to be clearly in mind.

Unless the principal defendant can be considered a corporation, it cannot be sued here under the name which the laws of Pennsylvania authorize it to use. Such laws have no extraterritorial force or effect. The trustee, therefore, was properly discharged. In the opinion of a majority of the court, the order discharging the trustee, and dismissing the action, must be affirmed.[9]

[9] ADDITIONAL PROBLEMS DEALING WITH LIMITED PARTNERSHIP ASSOCIATIONS. —Where the statement filed contains a specification and valuation of property contributed which is indefinite or inaccurate, members are held liable as general partners: Appeal of Hite Natural Gas Co., Limited, 118 Pa. 436, 12 Atl. 267 (1888); Hill v. Stetler, 127 Pa. 145, 17 Atl. 887 (1889); Vanhorn v. Corcoran, 127 Pa. 255, 18 Atl. 16, 4 L. R. A. 386 (1889); Gearing v. Carroll, 151 Pa. 79, 24 Atl. 1045 (1892); Haslet v. Kent, 160 Pa. 85, 28 Atl. 501 (1894); First Nat. Bank v. Creveling, 177 Pa. 270, 35 Atl. 595 (1896); Sheble v. Strong, 128 Pa. 315, 18 Atl. 397 (1889); Lee v. Burnley, 195 Pa. 58, 45 Atl. 668 (1900).

Statement not so indefinite or inaccurate as to impose personal liability upon the members as general partners: Rehfuss v. Moore, 134 Pa. 462, 19 Atl. 756, 7 L. R. A. 663 (1890); Cock v. Bailey, 146 Pa. 328, 23 Atl. 370 (1892); Staver & Abbott Mfg. v. Blake, 111 Mich. 282, 69 N. W. 508, 38 L. R. A. 798 (1896), in which case the court said: "We are aware that this decision is not in harmony with the decisions of the Supreme Court of Pennsylvania, but in so far as those decisions adopt the rigorous rule that the members of these associations are liable as partners because of some irregularity or defect in their organization or management, and thereby read into the statute a penalty which it does not impose, but which, by a fair construction of the statute, is excluded, we cannot follow them." See, also, Deckert v. Chesapeake Western Co., 101 Va. 804, 45 S. E. 799 (1903).

Limited partnership associations properly organized not liable on contracts, when there has been a failure to comply with the statutory requirements for association contracts: Pittsburgh Melting Co. v. Reese, 118 Pa. 355, 12 Atl. 362 (1888); Walker v. Brewing Co., 131 Pa. 546, 20 Atl. 309 (1889); Merc. Nat. Bank v. Lauth, 143 Pa. 53, 21 Atl. 1017 (1891); Hoyt v. Paw Paw Grape Juice Co., 158 Mich. 619, 123 N. W. 529 (1909). But such an association may be held liable for goods accepted under such a contract on an estoppel theory. See Yaryan Co. v. Pennsylvania Glue Co., Ltd., 180 Pa. 480, 36 Atl. 1080 (1897).

Although such an association is so defectively organized as to impose personal liability upon its members, it cannot, when sued as an association, take advantage of its defective organization by way of defense. Briar Hill Coal & Iron Co. v. Atlas Works, 146 Pa. 290, 23 Atl. 326 (1892).

A Pennsylvania association held taxable as a corporation in New Jersey under the corporation tax law of New Jersey in force in 1888. Tide Water Pipe Co., Limited, v. State Board of Assessors, 57 N. J. Law, 516, 31 Atl. 220, 27 L. R. A. 684 (1895).

Limited partnership association statutes, see Pa. St. 1920, §§ 16656–16684; Comp. Laws Mich. 1915, c. 151, §§ 7950–7966.

WILLIAMS et al. v. INHABITANTS OF MILTON.

(Supreme Judicial Court of Massachusetts, 1913. 215 Mass. 1, 102 N. E. 355.)

Petitions by Moses Williams and others, trustees, against the Inhabitants of Milton, against the City of Waltham, against the Inhabitants of Brookline, and against the City of Boston and others, for the abatement of taxes.

LORING, J. These are four petitions for the abatement of taxes assessed upon the plaintiffs as trustees of the Boston Personal Property Trust. The Boston taxes were assessed on the theory that the property held by the plaintiffs under that trust was partnership property to be assessed under St. 1909, c. 490, pt. 1, § 27, in Boston where the partnership (if there was a partnership) had its place of business. The other taxes were assessed upon the theory that the property held by the plaintiffs under that trust was held by them as trust property the income of which was payable to another person and was to be assessed under St. 1909, c. 490, pt. 1, § 23, cl. 5.

It has been contended in effect if not in terms that whatever may be its true character the trust for the purposes of taxation was a partnership. Doubtless the Legislature might provide that a trust which was not a partnership should be treated as a partnership for the purposes of taxation. But it has not done so. What the Legislature has done is to provide (1) that "personal property held in trust by an executor, administrator or trustee, the income of which is payable to another person, shall be assessed to the executor, administrator or trustee in the city or town in which such other person resides, if within the commonwealth," and if he resides out of the commonwealth, in the place where the trustee resides (St. 1909, c. 490, pt. 1, § 23); and (2) that "partners, whether residing in the same or in different cities or towns, may be jointly taxed under their firm name, in which their business is carried on, for all the personal property employed in such business, except ships or vessels" (St. 1909, c. 490, pt. 1, § 27). That is to say, the Legislature has provided that the right to tax property as trust or as partnership property depends upon the real character of the property taxed. Under these enactments of the Legislature there is no room for holding that property which is in reality not partnership property can be taxed as partnership property. The right to tax property as trust or as partnership property depends upon what the character of the property taxed really is.

We proceed to a discussion of the principles on which the question of the true character of the Boston Personal Property Trust depends.

Where persons associate themselves together to carry on business for their mutual profit, they are none the less partners because (1) their shares in the partnership are represented by certificates which are transferable and transmissible, and because (2) as a matter of convenience (if not of necessity in case of transferable and transmis-

sible certificates) the legal title to the partnership property is taken in the name of a third person. The person in whose name the partnership property stands in such a case is perhaps in a sense a trustee. But speaking with accuracy he is an agent who for the principal's convenience holds the legal title to the principal's property.

Several instances of such partnerships are to be found in our reports. In Hoadley v. County Com'rs of Essex, 105 Mass. 519, one Gordon McKay executed a declaration of trust by which he declared that he held his patents for sewing the soles of boots and shoes to the vamps, his factory where machines were manufactured under these patents and the whole business theretofore carried on by him, in trust for such persons as should buy certificates which were to be issued under that declaration of trust to the amount of 50,000 in number, the proceeds to be used in carrying on the factory and business assigned to and held by the trustee. The certificate holders were to be known as the McKay Sewing Machine Association and the business to be conducted by an executive committee to be chosen by them. This was held to create a partnership, and for that reason the shares were held not to be taxable to the holders of them. For a subsequent case involving the same association, where the same conclusion was reached, see Gleason v. McKay, 134 Mass. 419. In Whitman v. Porter, 107 Mass. 522, certain subscribers associated themselves together to buy a ferryboat to be run between Agawam and Springfield; the boat was to be conveyed to one of the subscribers in "trust" and the entire business was to be conducted by these trustees and their officers to be annually elected by the subscribers. The stock was assignable. These stockholders were held to be partners. In Phillips v. Blatchford, 137 Mass. 510, the money to carry on the business of manufacturing and selling grates was raised by the sale of transferable certificates issued under a somewhat similar declaration of trust which provided that the business should be carried on by a board of managers of whom the trustee was to be one, and the other members were to be elected by the shareholders. This also was held to be a partnership. In Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284, the doctrine of these cases was extended to a case where the purpose of the association was to buy cars to be leased to a specified railroad. The persons providing the purchase money were to have transferable certificates, which certificates by the terms of the lease to the railroad were to be paid in ten annual installments with six per cent. interest until paid. The certificate holders were declared in the declaration of trust to be an association, and all the business was to be transacted by a board of managers to be elected by them. The property of the association was to be held by the American Loan & Trust Company as trustee. This also was held to be a partnership. Williams v. Boston, 208 Mass. 497, 94 N. E. 808, was a similar case. The trust agreement in that case provided that the trust was established "for the purchase, development and disposition

of" the former site of the Museum of Fine Arts in Boston. The property was to be held by trustees, but the shareholders had a right to remove the trustees, and meetings of the shareholders were to be held at which the shareholders might authorize or instruct the trustees in any manner and alter or amend the declaration of trust, or direct the trustees to end the trust, sell the property and distribute the proceeds. The original papers in the case show these to have been the facts in the case, although they are not stated in the report of that decision. The property of this association was held to be taxable as partnership property.

In Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083, on the other hand, it was held that certificate holders under the declaration of trust there in question were not partners. In that case an inventor transferred his invention to trustees to whom by the terms of the trust indenture the patent was to be issued when it was issued. The trust indenture provided for the issue of scrip to those who should furnish to the trustees the money necessary for the more advantageous disposition of the invention. The trust on which the trustees were to hold the invention and the money produced by the issue of scrip was to hold, manage and dispose of the invention or any part thereof or interest therein upon such terms as to them (the trustees) or a majority of them should seem best, the net proceeds to be paid one half to the inventor and the other half to the holders of the scrip or certificates. The scrip, called in the trust indenture scrip or certificates, was transferable. Vacancies in the office of trustees were to be filled by the remaining trustees. It was held that the scrip holders were not partners, and in that respect the case was "unlike Gleason v. McKay, 134 Mass. 419, and Phillips v. Blatchford, 137 Mass. 510."

The difference between Hoadley v. County Commissioners, 105 Mass. 519 (involving the same indenture as that in Gleason v. McKay, 134 Mass. 419), Whitman v. Porter, 107 Mass. 522, Phillips v. Blatchford, 137 Mass. 510, Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284, and Williams v. Boston, 208 Mass. 497, 94 N. E. 808, on the one hand, and Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083, on the other hand, lies in the fact that in the former cases the certificate holders are associated together by the terms of the "trust" and are the principals whose instructions are to be obeyed by their agent who for their convenience holds the legal title to their property, the property is their property, they are the masters; while in Mayo v. Moritz, on the other hand, there is no association between the certificate holders, the property is the property of the trustees and the trustees are the masters. All that the certificate holders in Mayo v. Moritz had was a right to have the property managed by the trustees for their benefit. They had no right to manage it themselves nor to instruct the trustees how to manage it for them. As was said by C. Allen, J., in Mayo v. Moritz, 151 Mass. 481, 484, 24

N. E. 1083: "The scrip holders are cestuis que trust, and are entitled to their share of the avails of the property when the same is sold," and that is all to which they were entitled. In Mayo v. Moritz the scrip holders had a common interest in the trust fund in the same sense that the members of a class of life tenants and the members of a class of remaindermen (among whom the income of a trust fund and the corpus are to be distributed respectively) have a common interest. But in Mayo v. Moritz there was no association among the certificate holders just as there is no association although a common interest among the life tenants or the remaindermen in an ordinary trust. For a decision in this commonwealth somewhat like Mayo v. Moritz, ubi supra, see Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87. See, also, in this connection Makin v. Savings Institution, 23 Me. 350, 41 Am. Dec. 389; Burt v. Lathrop, 52 Mich. 106, 17 N. W. 716.

There is a case in England (Smith v. Anderson, 15 Ch. D. 247) in which the distinction between cases like Hoadley v. County Commissioners and Mayo v. Moritz was pointed out and established, and that case is now the established law in England. In Smith v. Anderson (decided by the Court of Appeals in 1880) the trust deed provided for the purchase by trustees of shares in the capital stock of 11 different submarine telegraph companies. The money was to be furnished by subscribers to whom transferable certificates were to be issued. The income derived from the submarine shares and the proceeds of any sales of them were to be applied by the trustees (1) in paying 6 per cent. interest on the trust certificates issued under the trust; (2) in redeeming these trust certificates at $120; and finally, when (3) all the certificates had been redeemed, the surplus, if any, was to be divided among the former certificate holders. It was held that this was a trust and not a company, association, or partnership which had to be registered under Companies Act of 1862 (25 & 26 Vict. c. 89) § 4. That act provided that "no company, association or partnership * * * shall be formed * * * for the purpose of carrying on any other business [that is to say, any business other than banking] that has for its object the acquisition of gain by the company, association or partnership, or by the individual members thereof unless it is registered." This conclusion was reached on the ground that there is a difference between a partnership where money raised by the issue of transferable certificates is to be held by so-called trustees who are really managing agents, and a trust where money raised by the issue of transferable certificates is to be held by trustees properly so called, and that the distinction between the two is that which we have just stated in detail.

The decision in Smith v. Anderson is the law of England to-day, although by reason of some special facts in that case and the way in which the question arose doubts as to the conclusion reached in that case have been thrown out by two or three individual judges. For the subsequent cases see Crowther v. Thorley, 32 W. R. 330; In re

Siddall, 29 Ch. D. 1; In re Jones, [1898] 2 Ch. 83, 91. For two cases where the distinction between managing agents who hold the legal title and trustees properly so called is reaffirmed, see In re Thomas, 14 Q. B. D. 379, 383; In re Faure Electric Accumulator Co., 40 Ch. D. 141, 151, 152.

This brings us to the question of the character of the Boston Personal Property Trust. It is plain that it is a trust and not a partnership. By the terms of the indenture of trust the property contributed by the certificate holders, or that bought with money contributed by them (the original trust property could be acquired in both ways by the terms of the indenture of trust), was to be held by the trustees in trust to pay the income to the holders of the certificates, and on the termination of the trust to divide the trust fund or the proceeds thereof among them. The certificate holders are throughout called "cestuis que trustent." The certificate holders, or "cestuis que trustent," are in no way associated together, nor is there any provision in the indenture of trust for any meeting to be held by them. The only act which (under the trust indenture) they can do is to consent to an alteration or amendment of the trust created by the indenture or to a termination of it before the time fixed in the deed. But they cannot force the trustees to make such alteration, amendment or termination. It is for the trustees to decide whether they will do any one of these things. All that the certificate holders or "cestuis que trustent" can do is to give or withhold their consent to the trustees taking such action. And the giving or withholding of consent by the cestuis que trust is not to be had in a meeting, but is to be given by them individually. As we have said, no meeting of the cestuis que trust for that or any other purpose is provided for in the trust indenture. The trustees of the Boston Personal Property Trust have a right to sell the trust securities and reinvest the proceeds, and also a limited power to borrow on the security of the trust property. The certificate holders, or "cestuis que trustent," as they are called in the trust deed, have a common interest in precisely the same sense that the members of a class of life tenants (among whom the income of a trust fund is to be distributed) have a common interest, but they are not socii, and it is the trustees, not the certificate holders, who are the masters of the trust property. The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end.

It has been urged by the learned counsel for the city of Boston that these certificate holders or "cestuis que trustent" are in effect carrying on the business of buying and selling securities through the trustees as managing agents or directors, and he refers to two facts which (he argues) bear him out in that contention, namely: (1) That the trustees on April 1, 1911, had on hand undivided income to the amount of $51,516.93, and a "surplus capital" amounting to $488,566.35. By

the terms of the trust the trustees are authorized to set aside from time to time such portion of the net income as shall not be required for dividends for a "surplus fund," which surplus fund may be subsequently used by them in their discretion in payment of dividends. It appears that the face value of the outstanding certificates is $2,090,-500. The surplus fund of undivided income therefore amounts to about 2½ per cent. of the corpus of the fund. The surplus capital of $488,566.35 is about 23½ per cent. of the face value of the outstanding certificates. That is not an extraordinary increase in the value of the corpus of the trust fund during a period of 18 years. But this contention brings out a fact in addition to those already referred to, which shows that the Boston Personal Property Trust is not a partnership, but a trust, and nothing but a trust. When persons engage as partners in buying and selling stocks, bonds and other securities for their mutual profit, the gains made by purchases and sales are profits of the partnership, divisible as such among those entitled to the profits of the partnership. In case of a trust, on the other hand, any gain made by a change of investments is an accretion belonging to the corpus of the trust fund and belongs to those who own the corpus of the fund. Such gains become part of the corpus as much as the original money contribution to the trust fund. On them the certificate holders or "cestuis que trustent" are entitled to income while the trust lasts, and to their share of them (because they are included in the corpus of the trust fund) when the trust ends and there is a distribution of the corpus among the cestuis que trust. That is the way in which the trustees of the Boston Personal Property Trust have dealt with gains made by changes of investment of the securities of that trust. That is to say, the trustees have treated gains from sales of securities not as profits of a partnership organized to buy and sell stock for a profit, but as gains on a change made in the investments of a trust fund.

It was largely with respect to the gains made by sales of the securities of the trust that the special circumstances in Smith v. Anderson raised a doubt as to that being a trust for investment and not a "business that has for its object the acquisition of gain." It was provided in the trust deed in Smith v. Anderson that the submarine telegraph shares should not be sold unless they brought a premium of 30 per cent., and that the proceeds of such sales should be used in the same way that the annual income derived from the submarine telegraph shares should be used, namely, in paying interest on the trust certificates and in retiring those certificates at $120 a share. They were issued originally at $90 per share. In that respect the trust in question in Smith v. Anderson was quite different from the Boston Personal Property Trust. There is nothing in the trust deed of the Boston Personal Property Trust which is in any way different from a trust under a will except that there are no limitations over and the

interests of the cestuis que trust are represented by transferable and transmissible certificates.

Up to this time we have not alluded to the declaration in the indenture of trust here in question that it was the intention of the parties to it to create a trust and not a partnership. It is what the parties did that is decisive. If there had been doubt as to what they did, what they intended to do would have been a matter entitled to some consideration in determining what they did.

It was stated in a passing remark made by this court in Williams v. Johnson, 208 Mass. 544, 552, 95 N. E. 90, that in the trust before the court in that case the certificate holders were partners within the meaning of that word in St. 1909, c. 490, pt. 1, § 27. While that trust provided for meetings of the shareholders and in that respect for some association of and among them, an examination of the original papers shows that it was a trust and not a partnership. This remark was in no way essential to the decision in Williams v. Johnson.

In the Boston Personal Property Trust the property is the property of the trustees, to be managed for the benefit of the certificate holders, but to be managed by the trustees and not by the certificate holders. There is no association of or among the certificate holders. The rights of the certificate holders are limited to each receiving his share of the income of the trust investments during the continuance of the trust and his share of the corpus of the trust when the trust comes to an end. It is in every respect an investment trust and nothing more.

It follows (1) that the property held by the plaintiff as trustees of the Boston Personal Property Trust was not taxable as partnership property, and that in the petition brought by them against the city of Boston they are entitled to an abatement; and (2) that their property was taxable as property held in trust, the income of which was payable to another, and the taxes assessed by the assessors of the city of Waltham and by the assessors of the inhabitants of Milton and of Brookline were properly assessed, and that the petitions against those municipalities should be dismissed.

It is so ordered.

CROCKER et al. v. MALLEY, Collector of Internal Revenue.

(Supreme Court of the United States, 1919. 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601.)

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Action by Alvah Crocker and others, trustees, against John F. Malley, Collector of Internal Revenue. Judgment of the District Court for plaintiffs was reversed by the Circuit Court of Appeals, and plaintiffs bring certiorari.

Mr. Justice HOLMES delivered the opinion of the Court.

This is an action to recover taxes paid under protest to the Collector of Internal Revenue by the petitioners, the plaintiffs. The taxes were assessed to the plaintiffs as a joint-stock association within the meaning of the Income Tax Act of October 3, 1913, c. 16, section II, G (a), 38 Stat. 114, 166, 172, and were levied in respect of dividends received from a corporation that itself was taxable upon its net income. The plaintiffs say that they were not an association but simply trustees, and subject only to the duties imposed upon fiduciaries by section II, D. The Circuit Court of Appeals decided that the plaintiffs, together, it would seem, with those for whose benefit they held the property, were an association, and ordered judgment for the defendant, reversing the judgment of the District Court. 250 Fed. 817, 163 C. C. A. 131.

The facts are these: A Maine paper manufacturing corporation with eight shareholders had its mills on the Nashua River in Massachusetts and owned outlying land to protect the river from pollution. In 1912 a corporation was formed in Massachusetts. The Maine corporation conveyed to it seven mills and let to it an eighth that was in process of construction, together with the outlying lands and tenements, on a long lease, receiving the stock of the Massachusetts corporation in return. The Maine corporation then transferred to the plaintiffs as trustees the fee of the property subject to lease, left the Massachusetts stock in their hands, and was dissolved. By the declaration of trust the plaintiffs declared that they held the real estate and all other property at any time received by them thereunder, subject to the provisions thereof, "for the benefit of the cestui que trusts (who shall be trust beneficiaries only, without partnership, associate or other relation whatever inter sese)" upon trust to convert the same into money and distribute the net proceeds to the persons then holding the trustees' receipt certificates—the time of distribution being left to the discretion of the trustees, but not to be postponed beyond the end of twenty years after the death of specified persons then living. In the meantime the trustees were to have the powers of owners. They were to distribute what they determined to be fairly distributable net income according to the interests of the cestui que trusts but could apply any funds in their hands for the repair or development of the property held by them, or the acquisition of other property, pending conversion and distribution. The trust was explained to be because of the determination of the Maine corporation to dissolve without waiting for the final cash sale of its real estate and was declared to be for the benefit of the eight shareholders of the Maine Company who were to receive certificates subject to transfer and subdivision. Then followed a more detailed statement of the power of the trustees and provision for their compensation, not exceeding one per cent. of the gross income unless with the written consent of a majority in interest of the cestui que trusts. A similar consent was required for the filling of

a vacancy among the trustees, and for a modification of the terms of the trust. In no other matter had the beneficiaries any control. The title of the trust was fixed for convenience as The Massachusetts Realty Trust.

The declaration of trust on its face is an ordinary real estate trust of the kind familiar in Massachusetts unless in the particular that the trustees' receipt provides that the holder has no interest in any specific property and that it purports only to declare the holder entitled to a certain fraction of the net proceeds of the property when converted into cash "and meantime to income." The only property expressly mentioned is the real estate not transferred to the Massachusetts corporation. Although the trustees in fact have held the stock of that corporation and have collected dividends upon it, their doing so is not contemplated in terms by the instrument. It does not appear very clearly that the eight Maine shareholders might not have demanded it had they been so minded. The function of the trustees is not to manage the mills but simply to collect the rents and income of such property as may be in their hands, with a large discretion in the application of it, but with a recognition that the receipt holders are entitled to it subject to the exercise of the powers confided to the trustees. In fact, the whole income, less taxes and similar expenses, has been paid over in due proportion to the holders of the receipts.

There can be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more. "The certificate holders * * * are in no way associated together nor is there any provision in the * * * [instrument] for any meeting to be held by them. The only act which (under the [declaration of] trust * * *) they can do is consent to an alteration * * * of the trust" and to the other matters that we have mentioned. They are confined to giving or withholding assent, and the giving or withholding it "is not to be had in a meeting but is to be given by them individually." "The sole right of the cestuis que trust is to have the property administered in their interest by the trustees, who are the masters, to receive income while the trust lasts, and their share of the corpus when the trust comes to an end." Williams v. Milton, 215 Mass. 1, 8, 10, 11, 102 N. E. 355, 358. The question is whether a different view is required by the terms of the present act. As by D above referred to trustees and associations acting in a fiduciary capacity have the exemption that individual stockholders have from taxation upon dividends of a corporation that itself pays an income tax, and as the plaintiffs undeniably are trustees, if they are to be subjected to a double liability the language of the statute must make the intention clear. Gould v. Gould, 245 U. S. 151, 153, 38 Sup. Ct. 53, 62 L. Ed. 211; United States v. Isham, 17 Wall. 496, 504, 21 L. Ed. 728.

The requirement of G (a) is that the normal tax thereinbefore imposed upon individuals shall be paid upon the entire net income accruing from all sources during the preceding year "to every corporation,

joint-stock company or association, and every insurance company, organized in the United States, no matter how created or organized, not including partnerships." The trust that has been described would not fall under any familiar conception of a joint-stock association, whether formed under a statute or not. Smith v. Anderson, 15 Ch. D. 247, 273, 274, 277, 282; Eliot v. Freeman, 220 U. S. 178, 186, 31 Sup. Ct. 360, 55 L. Ed. 424. If we assume that the words "no matter how created or organized" apply to "association" and not only to "insurance company," still it would be a wide departure from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense associated. It seems to be an unnatural perversion of a well-known institution of the law.

We do not see either that the result is affected by any technical analysis of the individual receipt holder's rights in the income received by the trustees. The description most in accord with what has been the practice would be that, as the receipts declare, the holders, until distribution of the capital, were entitled to the income of the fund subject to an unexercised power in the trustees in their reasonable discretion to divert it to the improvement of the capital. But even if it were said that the receipt holders were not entitled to the income as such until they got it, we do not discern how that would turn them into a joint-stock company. Moreover the receipt holders did get it and the question is what portion it was the duty of the trustees to withhold.

We presume that the taxation of corporations and joint-stock companies upon dividends of corporations that themselves pay the income tax was for the purpose of discouraging combinations of the kind now in disfavor, by which a corporation holds controlling interests in other corporations which in their turn may control others, and so on, and in this way concentrates a power that is disapproved. There is nothing of that sort here. Upon the whole case we are of opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts corporation's stock to the extra tax imposed by G (a).

Our view upon the main question opens a second one upon which the Circuit Court of Appeals did not have to pass. The District Court while it found for the plaintiffs, ruled that the defendant was entitled to retain out of the sum received by him the amount of the tax that they should have paid as trustees. To this the plaintiffs took a cross writ of error to the Circuit Court of Appeals. There can be no question that although the plaintiffs escape the larger liability, there was

probable cause for the defendant's act. The Commissioner of Internal Revenue rejected the plaintiff's claim, and the statute does not leave the matter clear. The recovery therefore will be from the United States. Rev. St. § 989 (Comp. St. § 1635). The plaintiffs, as they themselves alleged in their claim, were the persons taxed, whether they were called an association or trustees. They were taxed too much. If the United States retains from the amount received by it the amount that it should have received, it cannot recover that sum in a subsequent suit.

Judgment of the Circuit Court of Appeals reversed.

Judgment of the District Court affirmed.

HECHT et al. v. MALLEY, Former Collector of Internal Revenue.

(Supreme Court of the United States, 1924. 44 Sup. Ct. 462, 68 L. Ed. —.)

On Writs of Certiorari to the United States Circuit Court of Appeals for the First Circuit.

Actions at law by Simon Hecht and another, by Arthur L. Howard and another, trustees, and by Alvah Crocker and others, trustees, against John F. Malley, former Collector of Internal Revenue, and by Arthur L. Howard and another, trustees, against Andrew J. Casey, former Acting Collector of Internal Revenue. Judgments for plaintiffs (276 Fed. 830) were reversed and remanded by the Circuit Court of Appeals (281 Fed. 363), and plaintiffs petition for certiorari. Affirmed in part, and reversed in part.

Mr. Justice SANFORD delivered the opinion of the Court.

These four cases, which were heard together, involve the question whether the trustees of three "Massachusetts Trusts" are subject to the special excise taxes imposed upon certain associations" by the Revenue Act of 1916 (39 Stat. 756, c. 463), and the Revenue Act of 1918 (40 Stat. 1057, c. 18), based upon the value of their capital stock.

The petitioners in Case No. 99 are the trustees of the "Hecht Real Estate Trust"; in Nos. 100 and 101, the trustees of the "Haymarket Trust"; and in No. 119, the trustees of the "Crocker, Burbank & Co. Ass'n." Excise taxes were assessed against them under these Acts and paid under protest. They then brought suits for refund in the Federal District Court in Massachusetts, and had recoveries. 276 Fed. 830. The judgments in their favor were reversed by the Circuit Court of Appeals. 281 Fed. 363. And these writs of certiorari were granted. 260 U. S. 715, 717, 43 Sup. Ct. 93, 67 L. Ed. 478.

The "Massachusetts Trust" is a form of business organization, common in that State, consisting essentially of an arrangement whereby property is conveyed to trustees, in accordance with the terms of an in-

strument of trust, to be held and managed for the benefit of such persons as may from time to time be the holders of transferable certificates issued by the trustees showing the shares into which the beneficial interest in the property is divided. These certificates, which resemble certificates for shares of stock in a corporation and are issued and transferred in like manner, entitle the holders to share ratably in the income of the property, and, upon termination of the trust, in the proceeds.

Under the Massachusetts decisions these trust instruments are held to create either pure trusts or partnerships, according to the way in which the trustees are to conduct the affairs committed to their charge. If they are the principals and are free from the control of the certificate holders in the management of the property, a trust is created; but if the certificate holders are associated together in the control of the property as principals and the trustees are merely their managing agents, a partnership relation between the certificate holders is created. Williams v. Milton, 215 Mass. 1, 5, 102 N. E. 355; Frost v. Thompson, 219 Mass. 360, 365, 106 N. E. 1009; Dana v. Treasurer, 227 Mass. 562, 565, 116 N. E. 941; Priestly v. Treasurer, 230 Mass. 452, 455, 120 N. E. 100.

These trusts—whether pure trusts or partnerships—are unincorporated. They are not organized under any statute; and they derive no power, benefit or privilege from any statute. The Massachusetts statutes, however, recognize their existence and impose upon them, as "associations," certain obligations and liabilities.

The Hecht Real Estate Trust was established by the members of the Hecht family upon real estate in Boston used for offices and business purposes, which they owned as tenants in common. It is primarily a family affair. The certificates have no par value; the shares being for one-thousandths of the beneficial interest. They are transferable; but must be offered to the trustees before being transferred to any person outside of the family. The trustees have full and complete powers of management; but no power to create any liability against the certificate holders. There are no meetings of certificate holders; but they may, by written instrument, increase the number of trustees, remove a trustee, appoint a new trustee if there be none remaining, modify the declaration of trust in any particular, terminate the trust, or give the trustees any instructions thereunder.

The Haymarket Trust is strictly a business enterprise. It was established by the original subscribers who furnished the money for the purchase of a building in Boston used for store and office purposes. The shares are of the par value of $100 each. Except as otherwise restricted, the trustees have general and exclusive powers of management, but no power to bind the certificate holders personally. At any annual or special meeting of the certificate holders, they may fill any vacancies in the number of trustees, depose any or all the trustees and

elect others in their place, authorize the sale of the property or any part thereof, and alter or amend the agreement of trust.

The Crocker, Burbank & Co. Ass'n is also a business enterprise. It was formerly entitled the Wachusett Realty Trust. The certificates have no par value; the shares being for ninety-six thousandths of the beneficial interest in the property. The trustees originally held the fee of certain lands subject to a long lease and the stock of a Massachusetts corporation engaged in manufacturing paper and owning and operating several mills. In Crocker v. Malley, 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601 (1919), in which the original trust instrument was before the court, it was held that the trustees were not subject as to the dividends received from the corporation to the tax imposed by the Income Tax Act of 1913 (38 Stat. 172) upon the net income of "every corporation, joint-stock company or association, * * * organized in the United States," but were subject only to the duties imposed by the Act upon trustees. The original trust agreement involved in that case has now, however, been modified, with the assent of the certificate holders. By this modification "the form of [the] organization" was specifically "changed to that of an association," under its present name. The trustees were authorized to surrender the stock of the manufacturing corporation, to acquire instead its entire property, and to carry on the business theretofore conducted by it, or any substantially similar business. The title to all the trust property "and the right to conduct all the business" were vested exclusively in the trustees, who were authorized to designate from their number a president and other officers and to prescribe their duties. The certificate holders were authorized, at any meeting, to remove any trustee and elect trustees to fill any vacancies. Since the modification of the trust agreement the trustees have carried on the manufacturing business in substantially the same manner as it was formerly conducted by the corporation.

To determine rightly the scope and effect of the Revenue Acts now in question it is necessary to bear in mind the previous legislation on the same subject, and the interpretation given it by the decisions of this Court.

Section 38 of the Act of August 5, 1909, c. 6, 36 Stat. 11, 12—commonly called the Corporation Tax Law—provided:

"That every corporation, joint stock company or association, organized for profit and having a capital stock represented by shares, and every insurance company, now or hereafter organized under the laws of the United States or of any State or Territory, * * * or now or hereafter organized under the laws of any foreign country and engaged in business in any State or Territory of the United States * * * shall be subject to pay annually a special excise tax with respect to the carrying on or doing business, * * * equivalent to one per centum upon the entire net income over and above five thousand dollars received by it from all sources; * * * or if organized

under the laws of any foreign country, * * * from business transacted and capital invested within the United States and its Territories. * * *"

In Flint v. Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. 342, 55 L. Ed. 389, Ann. Cas. 1912B, 1312 (1911), the court, in sustaining the constitutionality of this section of the Act, said that the domestic corporations, joint stock companies or associations, as well as the insurance companies, "must be such as are now or hereafter organized under the laws of the United States or of any State or Territory," and that the tax was imposed "upon the doing of business with the advantages which inhere in the peculiarities of corporate or joint stock organizations of the character described," that is, "upon the exercise of the privilege of doing business in a corporate capacity, as such business is done under authority of state franchises."

In Eliot v. Freeman, 220 U. S. 178, 185, 31 Sup. Ct. 360, 361, 55 L. Ed. 424 (1911), it was held that this excise tax did not apply to two typical Massachusetts trusts. The court said:

"Under the terms of the Corporation Tax Law, corporations and joint stock associations must be such as are 'now or hereafter organized under the laws of the United States or of any State or Territory. * * *' The language * * * 'now or hereafter organized under the laws of the United States,' etc., imports an organization deriving power from statutory enactment. * * * The description of the corporation or joint stock association as one organized under the laws of a State at once suggests that they are such as are the creation of statutory law, from which they derive their powers and are qualified to carry on their operations. * * * Entertaining the view that it was the intention of Congress to embrace within the corporation tax statute only such corporations and joint stock associations as are organized under some statute, or derive from that source some quality or benefit not existing at the common law, we are of opinion that the real estate trusts involved in these two cases are not within the terms of the act."

We come now to the consideration of the Acts involved in the present cases.

1. *Revenue Act of 1916.*—Section 407, title 4, of this Act provides (39 Stat. p. 789 [Comp. St. § 5980a]) that:

"Every corporation, joint-stock company or association, now or hereafter organized in the United States for profit and having a capital stock represented by shares, and every insurance company, *now or hereafter organized under the laws of the United States, or any State or Territory,* * * * shall pay annually a special excise tax with respect to the carrying on or doing business, * * * equivalent to 50 cents for each $1,000 of the fair value of its capital stock," including the surplus and undivided profits, but less an exemption of $99,000 from the capital stock.

And, in a separate paragraph, that:

"Every corporation, joint-stock company or association, or insurance company, now or hereafter organized for profit under the laws of any foreign country and engaged in business in the United States shall pay annually a special excise tax, * * * equivalent to 50 cents for each $1,000 of the capital actually invested in the transaction of its business in the United States."

Section 10, title 1 (Comp. St. § 6336j), also provides that there shall be paid annually a tax of two per centum upon the net income received "by every corporation, joint-stock company or association, or insurance company, organized in the United States, no matter how created or organized."

The bill as introduced in the House of Representatives contained this provision for an income tax, but no provision for an excise tax. It was amended in the Senate so as to impose on every corporation, joint-stock company or association, as defined and limited in section 10, title 1, that is, "organized in the United States, no matter how created or organized," a special tax of 50 cents for each $1,000 "of capital, surplus and undivided profits used in any of the activities or functions of their business." The Chairman of the Senate Committee on Finance, in reporting the bill with this amendment, referred to it as "imposing a small tax upon corporations in the nature of a license tax for doing business." The House, however, did not agree to this amendment. And later, pursuant to the report of a Conference Committee, there was inserted in the bill, in lieu of the Senate amendment, the provision for a special excise tax now contained in section 407 of the Act, in which the words "no matter how created or organized" were omitted, and the words "organized under the laws of the United States, or any State or Territory," which had been contained in the Act of 1909, were inserted. 64th Cong. 1st Sess. H. R. 16763, and Sen. Rep. No. 793, pt. 1, p. 2; 53 Cong. Rec. pt. 11, p. 10663 and part 13, p. 14020.

It thus appears that Congress intended to make a clear distinction between the provisions relating to the income tax and to the excise tax, and purposely framed them, as shown by the amendment incorporated in the bill before its final passage, so that while the income tax provision should apply to all domestic corporations, joint-stock companies or associations, no matter how created or organized, the excise tax provision should only apply to such as were organized under statutory law. See United States v. Publishing Co., 219 U. S. 1, 13, 31 Sup. Ct. 212, 55 L. Ed. 65, 21 Ann. Cas. 942; United States v. St. Paul Railway, 247 U. S. 310, 318, 38 Sup. Ct. 525, 62 L. Ed. 1130.

The words, "now or hereafter organized under the laws of the United States or any State or Territory" appear in the Act of 1916 in precisely the same place with reference to the preceding words "every corporation, joint-stock company or association" as in the Act of 1909, and are separated from them in like manner by the phrase "and every

insurance company," followed by the like comma. And it is clear that in the intermediate phrase "now or hereafter organized in the United States for profit and having a capital stock represented, by shares," the words "in the United States" were inserted in the Act of 1916 after the word "organized" merely by reason of the fact that this Act refers to domestic and foreign corporations, joint-stock companies and associations in two separate paragraphs instead of in the same paragraph as in the Act of 1909. The words "organized in the United States" have no different effect, as applied to domestic corporations, joint-stock companies and associations, from the word "organized" as used in the Act of 1909, and in no wise remove the ensuing general limitation that they must be such as are "organized under the laws of the United States, or any State or Territory."

And since these limiting words, when used in the Act of 1909, had been held by this Court, in Eliot v. Freeman, to show the intention of Congress to embrace within the statute only such corporations and joint-stock associations as "are organized under some statute, or derive from that source some quality or benefit not existing at the common law," they must be given the same meaning and effect when used in the Act of 1916. In adopting the language used in an earlier act Congress must be considered to have adopted also the construction given by this Court to such language, and made it a part of the enactment. Sessions v. Romadka, 145 U. S. 29, 43, 12 Sup. Ct. 799, 36 L. Ed. 609; Latimer v. United States, 223 U. S. 501, 504, 32 Sup. Ct. 242, 56 L. Ed. 526. And here the legislative history of the excise tax provision of the Act of 1916, and the marked contrast between its language and that of the income tax provision of the same Act, plainly show, aside from this rule of statutory construction, that this is what Congress in fact intended.

We conclude that as the trusts involved in these four cases are not organized under any statute and derive from such source no quality or benefit, they are not within the terms of the excise tax provision of the Act of 1916.

2. *Revenue Act of 1918.*—Section 1 of this Act provides (40 Stat. p. 1057 [Comp. St. Ann. Supp. 1919, § 6371¼a]) that when used in the Act—the "term 'corporation' includes associations, joint-stock companies, and insurance companies"; the "term 'domestic' when applied to a corporation or partnership means *created or organized in the United States;*" and the "term 'foreign' * * * means created or organized outside the United States."

Section 1000(a), being Comp. St. Ann. Supp. 1919, § 5980n, provides that in lieu of the tax imposed by section 407 of the Revenue Act of 1916—"Every domestic corporation shall pay annually a special excise tax with respect to carrying on or doing business, equivalent to $1 for each $1,000 of so much of the fair average value of its capital stock for the preceding year," including the surplus and undivided profits, as is in excess of $5,000; and every "foreign corporation shall

pay annually a special excise tax with respect to carrying on or doing business in the United States, equivalent to $1 for each $1,000 of the average amount of capital employed in the transaction of its business in the United States during the preceding year."

By section 1400(a), being Comp. St. Ann. Supp. 1919, § 6371¾a, title 4 of the Revenue Act of 1916—including section 407 relating to excise taxes—is specifically repealed, except for the assessment and collection of taxes accrued thereunder and the imposition and collection of penalties and forfeitures.

Reading together the defining and enacting sections of the Act it is as if section 1000(a) provided in terms that: Every corporation, association, joint-stock company and insurance company, "created or organized in the United States," shall pay a special excise tax, as prescribed, with respect to the carrying on or doing business. And it must be given effect as thus read.

The terms of this Act are in marked and significant contrast with those of the Acts of 1909 and 1916. Not only is the Act of 1916 specifically repealed, but the well-defined words of limitation "organized under the laws of the United States, or any State or Territory," that had been used in that Act as well as in the Act of 1909, are omitted; and in lieu thereof the excise tax is extended, broadly, to every "association" created or organized in the United States and carrying on or doing business therein. And thereby, in our opinion, the intention of Congress is plainly shown to extend the tax from one imposed solely upon organizations exercising statutory privileges, as theretofore, to include also organizations exercising the privilege of doing business as associations at the common law.

It is true that the Chairman of the Ways and Means Committee of the House of Representatives in a statement as to "the general principles of the bill"—which included many kinds of taxes—while saying that the committee had made an important change in the rates and exemptions in the capital stock tax, made no reference to any enlargement to the class or organizations to which the tax would apply, and that the Chairman of the Senate Committee on Finance, in reporting on the bill, while stating that it "provided for the continuance of the capital stock tax on the basis of the fair average value of the capital stock of the corporation," and made certain changes in rates, likewise made no reference to any such enlargement in the scope of its provisions. 56 Cong. Rec. pt. 12, App. p. 698; 65th Cong. 3d Sess., Sen. Rep. No. 617, p. 17. We cannot, however, regard the slight negative inference which might be drawn from the failure of these chairmen to point out the enlargement of the class of organizations made subject to the excise tax, as sufficient to overcome the evidence of the legislative intention drawn from the plain and unambiguous language of the Act itself, emphasized by the contrast with that of the Act of 1916 which it supplanted.

Nor can we agree with the contention that the definition clause of the Act is not to be held applicable to the excise tax provision on the ground that the Act consolidated many former taxing acts and its general definitions may have been inadvertently extended to the excise tax provision without any actual intention of departing from the language of the former statute in this respect. This is not a mere revision and consolidation of former statutes to which a new interpretation is not to be given without some substantial change in phraseology. McDonald v. Hovey, 110 U. S. 619, 4 Sup. Ct. 142, 28 L. Ed. 269; Buck Stove Co. v. Vickers, 226 U. S. 205, 33 Sup. Ct. 41, 57 L. Ed. 189. It is a new statute, supplanting and changing the former statutes in many respects, and in which there is a significant change of phraseology, incorporated in the general definition clause made applicable, expressly, to every provision of the Act.

Nor does the language of the Act in this respect call for the application of the established rule that in the interpretation of statutes levying taxes their provisions are not to be extended by implication beyond the clear import of the language used, and in case of doubt are to be construed most strongly against the Government and in favor of the taxpayer. Gould v. Gould, 245 U. S. 151, 153, 38 Sup. Ct. 53, 62 L. Ed. 211; United States v. Merriam, 263 U. S. 179, 187, 44 Sup. Ct. 69, 68 L. Ed. ——. Here the language of the Act is specific, leaving no substantial doubt as to its meaning; and the taxpayers are seeking by implication to limit its clear import.

3. We also conclude that these three trusts are "associations" created or organized in the United States and engaged in business, within the meaning of the Act. The trustees of the Hecht and Haymarket Trusts insist that they are not such "associations." The trustees of the Crocker Association on the other hand admitted in the Circuit Court of Appeals and at the bar, that since the modification of the original trust agreement, the trust constitutes an "association."

The word "association" appears to be used in the Act in its ordinary meaning. It has been defined as a term "used throughout the United States to signify a body of persons united without a charter, but upon the methods and forms used by incorporated bodies for the prosecution of some common enterprise." 1 Abb. Law Dict. 101 (1879); 1 Bouv. Law Dict. (Rawle's 3d Rev.) 269; 3 Am. & Eng. Enc. Law (2d Ed.) 162; and Allen v. Stevens, 33 App. Div. 485, 54 N. Y. Supp. 8, 23, in which this definition was cited with approval as being in accord with the common understanding. Other definitions are:

"In the United States, as distinguished from a corporation, a body of persons organized, for the prosecution of some purpose, without a charter, but having the general form and mode of procedure of a corporation." Webst. New Internat. Dict.

"[U. S.] An organized but unchartered body analogous to but distinguished from a corporation." Pract. Stand. Dict.

And see Malley v. Bowditch, 259 Fed. 809, 812, 170 C. C. A. 609,

7 A. L. R. 608; Chicago Title Co. v. Smietanka (D. C.) 275 Fed. 60: also United Mine Workers v. Coronado Co., 259 U. S. 344, 392, 42 Sup. Ct. 570, 66 L. Ed. 975, 27 A. L. R. 762, in which unincorporated labor unions were held to be "associations" within the meaning of the Anti-Trust Law.

We think that the word "association" as used in the Act clearly includes "Massachusetts Trusts" such as those herein involved, having quasi-corporate organizations under which they are engaged in carrying on business enterprises. What other form of "associations," if any, it includes, we need not, and do not, determine.

It is true that in Eliot v. Freeman, supra, at page 186 (31 Sup. Ct. 361), it was said that the two trusts there involved could "hardly be said to be organized within the ordinary meaning of that term." However the decision was based solely upon the ground that they were not subject to the tax imposed by the Act of 1909 because they were not organized under any statute; and the inference from the entire opinion is that if the Act had not required such a statutory organization they would have been held to be within its terms. And we think that the present trusts are both "created" and "organized" in the United States within the meaning of the Act.

The trustees of the Hecht and Haymarket Trusts earnestly rely, however, upon the decision in Crocker v. Malley, supra, as conclusively determining that they cannot be held to be "associations" unless the trust agreements vest the shareholders with such control over the trustees as to constitute them more than strict trusts within the Massachusetts rule. This case arose under section 2, G(a), of the Income Tax Act of 1913 imposing a tax upon the net income of "every corporation, joint-stock company or association, * * * organized in the United States, no matter how created or organized." Section 2, D, provided that trustees or other fiduciaries were exempt from this tax upon dividends received from corporations taxable upon their net income. The precise question was whether the trustees of The Wachusett Realty Trust were subject to the income tax upon dividends received from a Massachusetts corporation that was itself taxable upon its net income. The trustees insisted that they were not an "association" subject to this tax, under G(a), but merely trustees and entitled to the exemption as fiduciaries under D. The trust had been created by a Maine corporation which contemplated dissolution, for the benefit of its shareholders. It had transferred to the trustees the fee of certain lands leased to a Massachusetts manufacturing corporation engaged in operating several mills, and also the stock in that corporation which it held. The purpose of the trust was to convert this property into money and distribute the net proceeds to the beneficiaries, within a period left to the discretion of the trustees. Meanwhile they were to distribute the net income, but could apply any funds for the repair and development of the property or the acquisition of other property, pending conversion and distribution. Their function, as emphasized

in the opinion, was not to manage the mills, but simply to collect the rents and income, with a large discretion in its application. The beneficiaries had no control except in certain matters in which their consent was required.

The court, after stating that the declaration of trust on its face was "an ordinary real estate trust of the kind familiar in Massachusetts," and that there "could be little doubt that in Massachusetts this arrangement would be held to create a trust and nothing more," said that "as the plaintiffs undeniably are trustees, if they are to be subjected to a double liability the language of the statute must make the intention clear," and that:

"It would be a wide departure from normal usage to call the beneficiaries here a joint-stock association when they are admitted not to be partners in any sense, and when they have no joint action or interest and no control over the fund. On the other hand, the trustees by themselves cannot be a joint-stock association within the meaning of the act unless all trustees with discretionary powers are such, and the special provision for trustees in D. is to be made meaningless. We perceive no ground for grouping the two—beneficiaries and trustees—together, in order to turn them into an association, by uniting their contrasted functions and powers, although they are in no proper sense, associated. * * * We presume that the taxation of corporations and joint-stock companies upon dividends of corporations that themselves pay the income tax was for the purpose of discouraging combinations of the kind now in disfavor, by which a corporation holds controlling interests in other corporations which in their turn may control others, and so on, and in this way concentrates a power that is disapproved. There is nothing of that sort here. Upon the whole case we are of opinion that the statute fails to show a clear intent to subject the dividends on the Massachusetts corporation's stock to the extra tax imposed by G(a)."

This opinion is based primarily upon the view that the Income Tax Act, considering its purpose, did not show a clear intention to impose upon the trustees as an "association" a double liability in reference to the dividends on stock in the corporation that itself paid an income tax, when considered as "trustees" they were by another provision of the Act exempt from such payment. And the language used arguendo in reaching this conclusion that the trustees could not be deemed an association unless all trustees with discretionary powers are such, and that there was no ground for grouping together the beneficiaries and trustees in order to turn them into an association—is to be read in the light of the trust agreement there involved, under which the trustees were, in substance, merely holding property for the collection of the income and its distribution among the beneficiaries, and were not engaged, either by themselves or in connection with the beneficiaries, in the carrying on of any business. Zonne v. Western Syndicate, 220

U. S. 187, 190, 31 Sup. Ct. 361, 55 L. Ed. 428. And see Smith v. Anderson, L. R., 15 Ch. Div. 247.

It results that Crocker v. Malley is not an authority for the broad proposition that under an Act imposing an excise tax upon the privilege of carrying on a business, a Massachusetts Trust engaged in the carrying on of business in a quasi-corporate form, in which the trustees have similar or greater powers than the directors in a corporation, is not an "association" within the meaning of its provisions.

We conclude, therefore, that when the nature of the three trusts here involved is considered, as the petitioners are not merely trustees for collecting funds and paying them over, but are associated together in much the same manner as the directors in a corporation for the purpose of carrying on business enterprises, the trusts are to be deemed associations within the meaning of the Act of 1918; this being true independently of the large measure of control exercised by the beneficiaries in the Hecht and Haymarket Cases, which much exceeds that exercised by the beneficiaries under the Wachusett Trust. We do not believe that it was intended that organizations of this character—described as "associations" by the Massachusetts statutes, and subject to duties and liabilities as such—should be exempt from the excise tax on the privilege of carrying on their business merely because such a slight measure of control may be vested in the beneficiaries that they might be deemed strict trusts within the rule established by the Massachusetts courts.

That the Crocker Association is engaged in carrying on business within the meaning of the Act, is obvious. And so of the Hecht and Haymarket Trusts. A corporation owning and renting an office building is engaged in business within the meaning of an excise statute. Flint v. Stone-Tracy Co., supra, page 171 (31 Sup. Ct. 342); Zonne v. Western Syndicate, supra, at page 190 (31 Sup. Ct. 361).

4. It is urged, however, by the trustees of the Crocker Association that they are not subject to an excise tax under the Act of 1918, because the tax imposed on a domestic "association" is measured by "the fair average value of its capital stock"; the argument being that this tax, of necessity, can apply only to "associations" having a fixed "capital stock" represented by shares, that is, a designated share capital whose amount is fixed by the articles of association or trust agreement. Hence, it is insisted, the tax cannot apply to this Association, which, it is claimed, has no "capital stock" within the meaning of the Act. The trustees of the Hecht Trust do not make this contention.

The certificates in this Association, as stated, have no par value; the shares being for ninety-six thousandths of the beneficial interest in the property. No "capital" account is kept by the trustees; but they have a profit and loss account, in which they are charged with all the property transferred to them, at a valuation, against which liabilities and reserves are shown, the balance being carried as the net interest of the shareholders. And their books show the "dividends" disbursed

to shareholders. The amount of the present tax was assessed by the Collector by taking the fair value of the assets of the Association over its liabilities, and calling the difference its capital stock.

It is true that, generally speaking, in the technical sense, the capital stock of a corporation is a sum fixed by its corporate charter as the amount paid or to be paid in by the stockholders for the prosecution of the business of the corporation and the benefit of its creditors. 1 Cook on Corporations (7th Ed.) 38, and cases cited in note 2. However, in statutes relating to taxation, sometimes drawn without regard to the technical meaning of the words, the courts will construe "capital stock" to mean the actual property of the corporation, when necessary to carry out the intent of the statute. Id. p. 39; Security Co. v. Hartford, 61 Conn. 89, 101, 23 Atl. 699; Henderson Bridge Co. v. Commonwealth, 99 Ky. 623, 641, 31 S. W. 486, 29 L. R. A. 78. And see People v. Coleman, 126 N. Y. 433, 439, 27 N. E. 818, 12 L. R. A. 762.

We think that in the Act of 1918, in which the tax upon an association is based upon the average value of its "capital stock," including surplus and undivided profits, these words are not to be given a technical meaning, but should be interpreted, in their entirety, and, in the absence of a fixed share capital, as equivalent to the capital invested in the business, that is, the net value of the property owned by the association and used in its business. As was said by the Circuit Court of Appeals, the phrase in the statute as to "including surplus and undivided profits puts beyond doubt the question of the congressional intent to measure this tax by business and financial realties, not by bookkeeping forms or mere names." And this construction is in harmony with the provision as to the excise tax on a foreign association, which is fixed upon the value "of its capital actually invested in the transactions of its business in the United States."

We therefore conclude that the Crocker Association was also subject to the tax, and that this was properly measured by the Collector by the net value of its property—no question being made as to the correctness of his valuation.

5. A question remains in Cases Nos. 100 and 119—which has not been argued by counsel—as to the taxes for the years ending June 30, 1919, which were assessed against the trustees of the Haymarket Trust and the Crocker Association under the Act of 1916, and paid by them before the passage of the Act of 1918. The latter Act, which was approved and became effective February 24, 1919, was retroactive in its provisions and covered the year ending June 30, 1919 (40 Stat. at page 1126). Thereafter additional taxes were assessed against the trustees, representing the differences between the amount of the taxes which they had paid under the Act of 1916 and those prescribed by the Act of 1918. See note 2, supra.

In view of the retroactive provision of the Act of 1918, we are of opinion that the taxes for the year ending June 30, 1919, cannot now

be recovered, even though originally their assessment under the Act of 1916 was unauthorized, since they thereafter became due under the Act of 1918; and that they may now be retained by the United States. See Anderson v. Loan & Trust Co., 241 Fed. 322, 325, 154 C. C. A. 202, and New York Life Ins. Co. v. Anderson, 263 Fed. 527, 530; also Crocker v. Malley, supra, at page 235 (39 Sup. Ct. 270).

The decrees of the Circuit Court of Appeals are accordingly affirmed in cases Nos. 100, 101, and 119; and in No. 99 affirmed as to the taxes assessed for the years ending June 30, 1919, and June 30, 1920, and reversed as to those assessed for the six months ending June 30, 1917, and the year ending June 30, 1918.

Affirmed in part.

Reversed in part.

Mr. Justice HOLMES and Mr. Justice BRANDEIS took no part in the decision of these cases.

DANA v. TREASURER AND RECEIVER GENERAL et al.

(Supreme Judicial Court of Massachusetts, 1917. 227 Mass. 562, 116 N. E. 941.)

Bill for instructions by Richard H. Dana, executor of Edith L. Dana, deceased, against the Treasurer and Receiver General and another. From the decree rendered, Dana appeals.

LORING, J.[10] Edith L. Dana died domiciled in Massachusetts and possessed of 75 shares in the Amoskeag Manufacturing Company, 130 shares in the Boston Ground Rent Trust, and an "interest under the Duluth & Gladstone Real Estate Trust." A succession duty was imposed upon each of these pieces of property. Mrs. Dana's husband, the sole residuary devisee and legatee under her will, made the claim that the three pieces of property in question or "so much of" them as consists of an equitable interest in real estate situate outside the territorial limits of the state were not the subject of a succession duty in this commonwealth. Thereupon the executor brought a bill for instructions in the probate court, making the treasurer and receiver general and Mrs. Dana's husband the parties defendant. The probate court decided that said property was subject to a succession duty. From that decree Mr. Dana took the appeal which is now before us.

1. Mr. Dana's contention is that an equitable estate in land lying outside of the commonwealth, although owned by one domiciled in it at the date of his death, is not subject to a succession duty here. There is no question of the correctness of that proposition. See, for example, Attorney General v. Barney, 211 Mass. 134, 97 N. E. 750, 39 L. R. A. (N. S.) 1024; Walker v. Treas. & Recvr. Genl., 221

[10] Part of the opinion is omitted.

Mass. 600, 109 N. E. 647. The question which we have to decide is how far that principle of law is applicable in this case.

2. We take up first Mrs. Dana's shares in the Amoskeag Manufacturing Company. The Amoskeag Manufacturing Company was the name by which the trustees under a declaration of trust were to be known in their collective capacity as matter of convenience in the practical conduct of the business carried on by them under that declaration of trust. The trust was created to take over the factory and manufacturing business theretofore owned and carried on by a New Hampshire corporation known as the Amoskeag Manufacturing Company. The factory in question and the tangible personal property held under the trust are situate in the state of New Hampshire. "The beneficial interest in this trust" is divided into shares. These shares are represented by transferable certificates. It is provided in the declaration of trust that the death of a shareholder shall not operate to determine the trust nor entitle the legal representatives of a deceased shareholder to an accounting, but that the executors, administrators and assigns of the deceased shareholder shall succeed to the rights of the decedent and be entitled to a certificate in their own names upon surrender of the old certificate. It is also provided therein that the ownership of shares thereunder shall not entitle the shareholder to any title in or to the trust property or right to call for partition or division of the same, or for an accounting. The declaration of trust provides for meetings of the shareholders, and that at these meetings the shareholders shall have power to elect the trustees and to alter and amend the declaration of trust. It is further provided therein that on the expiration of 21 years after the death of certain persons therein named the trustees shall wind up the affairs of the trust, liquidate its assets and distribute the same among the holders of shares. There is a provision in it whereby the time for winding up its affairs can be shortened or extended by the shareholders at shareholders' meetings. In addition there is a provision which authorizes the trustees in case they elect so to do "to distribute the shares, securities or obligations instead of cash" in case of the liquidation of the assets of the trust. But there is no provision authorizing them to distribute among the shareholders the real property by the trust.

This declaration of trust created a partnership. Upon that point Phillips v. Blatchford, 137 Mass. 510, is decisive. In addition the trust is well within the distinction between trusts which create partnerships and trusts which are pure trusts, stated at length in Williams v. Milton, 215 Mass. 1, 102 N. E. 355, where the cases are collected. For the last case in which this distinction was applied and the trust held to have created a partnership see Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009.

It is alleged in the petition and admitted by the answer that at the date of Mrs. Dana's death over 75 per cent. of the property of the

Amoskeag Manufacturing Company consisted of real estate situate in New Hampshire and 23 per cent. of it "consisted of tangible personal property in New Hampshire in the shape of raw material and goods finished and in process of manufacture," the other 2 per cent. seems to have been made up of intangible personalty.

It is the contention of the appellant that a person dying possessed of one of the shares of this trust dies possessed of real estate to the extent to which the assets of the trust at the time of the decedent's death consist of real estate and of personal property to the extent to which those assets consist of personal property at that time. And we see no escape from that result if the rule as to partnership real estate which obtains in this commonwealth in case of ordinary partnerships applies to a partnership like the Amoskeag Manufacturing Company.

In case of an ordinary partnership there is no practical difficulty in carrying out the Massachusetts rule as to partnership real estate, namely, that so far as necessary to pay the debts of the firm partnership real estate is personalty, but that for all other purposes it is real property. In an ordinary case a partnership comes to an end upon the death of each partner and by reason of that fact the partnership affairs have to be wound up at that time. In such a case there is no practical difficulty in winding up the estate of the decedent partner under the Massachusetts rule as to partnership real estate. But the same rule applied to partnership real estate in a partnership like the Amoskeag Manufacturing Company partnership would raise great practical difficulties. Take the case of a person who dies owning one share in the Amoskeag Manufacturing Company partnership. If the Massachusetts rule as to partnership real estate applies, that one share (as we have said already) is real estate to an amount determined by ascertaining the proportion of the real estate owned by the partnership to all its assets and is personal property to the amount determined by ascertaining the proportion between its personal property and those assets. If that be so that one share must be dealt with accordingly in winding-up the estate of the decedent; that is to say, so far as that one share is real estate it cannot be sold without a license from the probate court to sell it as real estate although so far as it is personal property it can be sold by the executor or administrator by virtue of his office.

Wilcox v. Wilcox, 13 Allen, 252, is the case in which the rule as to partnership real estate in case of ordinary partnerships was finally established in this commonwealth. It was pointed out in that case (13 Allen, at page 254) that "upon examination of the earlier English cases, from which this doctrine [the English doctrine that in case of partnership real estate there is an out and out conversion of it into personal property for all purposes] has grown, it will be found that, in several of them, there was an express agreement between the copartners, the specific performance of which would of itself convert

the real estate into personal assets. The conversion was worked, therefore, not merely from the relation of copartnership, but on the ground that the deceased partner had, by the very contract under which he became joint owner, stamped upon the realty the character and incidents of personalty."

From an examination of the authorities before the court in Wilcox v. Wilcox, it is plain that one of the cases thus referred to was Ripley v. Waterworth, 7 Vesey, 425. The agreement in Ripley v. Waterworth was an agreement that on the conclusion of the partnership all the partnership property should be sold and reduced to cash. That is to say the agreement which it was held in at least one of the early cases referred to in Wilcox v. Wilcox, to work an out and out conversion was an agreement of the same kind as the agreement in the case of Amoskeag Manufacturing Company partnership. Since the decision in Ripley v. Waterworth it has been held and is now established in England (for reasons based on practical considerations) that partnership realty is converted out and out to personalty in the absence of an agreement, and that this conversion dates from the beginning of the partnership. For this reason no late cases bearing on the case at bar are to be found there. It was not necessary in Ripley v. Waterworth to decide what the time was from which the real estate was converted into personalty by force of this agreement. That point, however, is covered (so far as the case now before us is concerned) by the decision in Fletcher v. Ashburner, 1 Bro. C. C. 497. In that case a testator devised his real and personal property to trustees to permit his widow to enjoy the residue during her life and after her decease to sell the same and distribute the proceeds between his son and his daughter or in case his widow should marry again then and in that case to sell all the estate and effects given her for life and to divide the proceeds between his wife, his son and his daughter share and share alike; and in case either the son or the daughter should die before his or her legacy should become due, the share or legacy of him or her so dying was to go to the survivor. The son survived the daughter. Both died during the lifetime of the widow. Upon the death of the widow it was held that the property went to the next of kin of the son and not to his heirs. This conclusion was reached on the ground that the testator had in effect provided that his real and personal property should be one fund from the beginning. It was decided in terms in Fletcher v. Ashburner that the gift to the son and daughter vested at the date of the death of the testator subject to each being divested by the gift to the survivor in case of the death of the legatee in question before the legacy came into possession. That is to say it was held that the fund was personal property at the date of the death of the son which took place during the life of the widow and so before the sale was to take place which in fact made the real property personalty. And it is plain that on principle this is correct. Where real property is held to be converted into personalty

because with personal property it is made one fund and all the fund is ultimately to be personalty, it cannot be one fund from the beginning unless the conversion takes place from the beginning. In the declaration of trust creating the Amoskeag Manufacturing Company partnership it is provided that upon the termination of the trust all the partnership real estate shall be converted into personalty, and it is provided that throughout the life of the partnership the beneficial interest in it shall be represented by transferable certificates; in this way it is provided that the property of the trust partnership shall constitute one fund. It follows that the conversion into personalty must be taken to date from the beginning to make the fund one fund from the beginning.

It follows that the shares of the Amoskeag Manufacturing Company partnership owned by Mrs. Dana at the time of her death were personal property and passed to her executor by virtue of the laws of this commonwealth because of her domicile in this state at that time. Since they were personal property a succession duty was rightly imposed upon them. * * *

We are of opinion that the succession duty imposed upon Mrs. Dana's shares in the Amoskeag Manufacturing Company was valid.

3. We are of opinion that the same conclusion must be reached with respect to the succession duty imposed upon the 130 shares in the Boston Ground Rent Trust held by Mrs. Dana at the date of her death.

At the date of Mrs. Dana's death 85 per cent. of the property of that trust consisted of real estate situated outside of Massachusetts. On the allegations contained in the petition and admitted by the answer it must be taken that the balance of 15 per cent. consisted of personal property. The beneficial interest in this trust was divided into shares, and for these shares transferable certificates were issued by the trustees. The declaration of trust provided for meetings of the shareholders at which they might instruct the trustees in any manner not inconsistent with the declaration of trust and at which the declaration of trust might be altered or added to accordingly. It further provided that at a time fixed in the trust "or at such earlier time as three quarters in value of the shareholders should direct," the trustees should terminate the trust by selling all property then held by them and dividing the proceeds among the shareholders. The principal difference between the Ground Rent Trust and the Amoskeag Manufacturing Company is that the personal property (amounting to 15 per cent. of all the property of the trust at Mrs. Dana's death) did not come into existence until after the creation of the trust. It came into existence by virtue of a clause in the declaration of trust providing that the trustees might set aside not more than 10 per cent. of the annual income for a contingent fund or sinking fund or both. It appears, therefore, that the property of the Ground Rent Trust was ultimately to be reduced into personal property, and that the trust property (in part real and in part personal property) was to be one.

Under these circumstances we are of opinion that the same conclusion must be reached in this trust as in the Amoskeag Manufacturing Company. It follows that the succession duty imposed on the 130 shares in the Boston Ground Rent Trust was properly imposed upon them as personal property held by a person domiciled in this commonwealth at the date of her death.

The conclusion which we have reached as to Mrs. Dana's interest in the Boston Ground Rent Trust seems to be in conflict with the conclusion reached in Bartlett v. Gill (D. C.) 221 Fed. 476, as to the character of shares in City Associates, Commonwealth Land Trust, Boston Real Estate Trust, Bedford Building Association, and the Municipal Real Estate Trust. It does not affirmatively appear that personal property as well as real estate was held by the trustees of those trusts. But it was assumed in Bartlett v. Gill that that might have been the case. We have examined the authorities cited in Bartlett v. Gill and find nothing in them inconsistent with the conclusion which we have reached; so far as the decision in that case is in conflict with the conclusion here reached we are of opinion, after giving due consideration to it, that it ought not to be followed. Beal v. Carpenter, 235 Fed. 273, 148 C. C. A. 633, is the only other case which has come to our attention in which these matters are discussed.

4. The "interest," or, speaking more accurately, the interests, of the decedent in the Duluth & Gladstone Real Estate Trust are quite different.

Without going into details we are of opinion that by the true construction of that trust the decedent had interests in it of two kinds. The property of that trust consisted of real estate and real estate alone. The persons interested in the trust were Mrs. Dana (the decedent), Mr. Dana (her husband) and a Mr. Hale. The real estate consisted of one parcel of land in Duluth in the state of Minnesota and one parcel of land in Gladstone in the state of Michigan. We are of opinion that by the true construction of the declaration of trust the decedent and her husband each owned one undivided equitable quarter interest in the Duluth real estate, and that Mr. Hale owned the other two-quarters undivided equitable interest in that part of the trust realty (i. e., in the Duluth land) subject to a lien on his (Mr. Hale's) two quarters held by the decedent to secure the payment to her of the sum of $9,033. The beneficial interest in the Gladstone real estate was all owned by Mr. Hale, but it was subject (1) to a lien for the payment to Mr. Dana of $2,500; and (2) to a lien in favor of the decedent for payment of the same $9,033, for which she had a lien upon Mr. Hale's undivided beneficial interest in the land in Duluth.

There was no provision in the declaration of trust for meetings of the owners of the beneficial interests in this trust property. The owners of the beneficial interest had a common interest but they were not associated together in any way. As we have already said there was

no personal property held by the trustee and there was no provision for the issue of certificates to represent the shares to those who held the beneficial interests in the trust. There was a provision putting restrictions upon the assignment of their interests by the owners of the beneficial property, but that is the only provision of the declaration of trust in that connection. It was provided that the real estate remaining unsold at the end of 20 years should be sold and the proceeds divided as stated above. As there was a provision directing that all real estate should be sold at the end of the trust there was a provision for a conversion of the real estate into personal property. But in such a case no conversion takes place until the date when the sale is directed to be made and at Mrs. Dana's death her interests as a holder of one undivided fourth of the land in Duluth was an interest in real estate outside the commonwealth, and so not subject to a tax in Massachusetts. * * *

But Mrs. Dana's interest created by this declaration of trust which secured to her the payment of $9,033, by a pledge of Mr. Hale's beneficial interest to the extent of one-half of the land in Duluth, and his beneficial interest in the whole of the land in Gladstone was subject to a succession tax in Massachusetts. This interest was of the same kind as the interest of the holder of a note secured by mortgage on land lying outside the commonwealth. In both cases the debt is personal property; it passes by succession to her executor or administrator by force of the laws of Massachusetts, and so is subject to a succession duty here.

The Attorney General has contended that the undivided fourth interest of Mrs. Dana is personal property because it is impliedly provided that it shall pass by assignment. The exact provisions of the declaration of trust are as follows:

"5. No assignment of a subscriber's interest shall be made of less than one-half his original interest and not to more than one person, though more than one person may take under a will or as distributee. Any assignment to be valid must be in duplicate, each countersigned by the trustee and one preserved by him. On any new assignment of the same interest the old one must be delivered to the trustee to be canceled to the amount of the interest assigned."

And he has made the same contention with respect to Mrs. Dana's interests in Amoskeag Manufacturing Company and in the Boston Ground Rent Trust. This contention is not of consequence in connection with the Amoskeag Manufacturing Company and the Boston Ground Rent Trust because we have reached the conclusion that Mrs. Dana's interest in those trusts was personal property. The argument of the Attorney General is that a beneficial interest in real estate can be conveyed by deed only; in other words, that so far as the conveyance or transfer of the equitable ownership in real property is concerned the same rule applies as that which governs the conveyance of a legal title to land, and since it is provided (at least impliedly)

that these equitable interests can be assigned without a deed, it is provided that they are personalty. But although support for that contention is to be found in Bartlett v. Gill, ubi supra (D. C.) 221 Fed. at page 485, it is without foundation. Conveyances of legal estates are the outcome of feudal tenures, and are founded on the doctrine of feoffment with livery of seizin. The transfer of an equitable interest in real estate has nothing to do with feudal tenures, and is not dependent on the doctrine of feoffment with livery of seisin. The only provision of law regulating the transfer of an equitable estate in land is the third section of statute of frauds (St. 29 Car. II, c. 3) re-enacted at the present time in this commonwealth in R. L. c. 127, § 3, and that provision is that the assignment must be in writing. In other words the method of transfer adopted (i. e., by an assignment in writing) is as applicable to a transfer of an equitable estate in land as it is to a transfer of personal property.

Another contention of the Attorney General is that Mrs. Dana's interest as owner of one undivided fourth part of the Duluth real estate is subject to a succession tax in this commonwealth because the sole trustee was and is a resident of this commonwealth, and he contends for that reason that a succession duty upon that interest comes within the decision made in Bliss v. Bliss, ubi supra, as to registered bonds of the commonwealth.

We do not need to decide whether that contention would have been correct had nothing more appeared in the case. But more does appear; it is alleged in the petition that: "Said interest [Mrs. Dana's] under the Duluth & Gladstone Real Estate Trust consists of an equitable interest in real estate situated entirely outside of Massachusetts in the states of Minnesota and Michigan. It is the law of each of said states that the trust is to be enforced as to the real estate in each of those states by the courts in those states respectively without recourse to the laws or the courts of Massachusetts."

This allegation was admitted by the Attorney General in his answer. Whether the statutes of Minnesota and Michigan do or do not provide for an enforcement of a trust with respect to real estate situate within their territorial limits when the trustee resides out of the state are questions of fact. Counsel for Mr. Dana has contended that the allegations set forth above are allegations of the existence of such statutes, and we are of opinion that in this contention he is right. It follows that on the record it must be taken to be the fact that without resorting to the courts of this commonwealth Mrs. Dana and her successor in title could have asserted their rights as owners of one undivided fourth part in the beneficial property in the Duluth real estate, and this interest does not come within the decision in Bliss v. Bliss, ubi supra. * * *

It must be taken on the record that the succession duty imposed upon Mrs. Dana's "interest under the Duluth and Gladstone Real Estate Trust" was imposed upon all the interests which she had under

that trust. That is to say both upon her interest as the holder of a debt secured by pledge of Mr. Hale's equitable interest under the trust and as holder of an undivided equitable fee in that portion of the trust property which consisted of land in Duluth. So far as the latter is concerned the property was not subject to a succession tax. To that extent the decree of the probate court was wrong; so far as the former is concerned it is right.

It does not appear whether the succession duty imposed upon Mrs. Dana's "interest under the Duluth and Gladstone Real Estate Trust" was imposed on her interest by way of a lien for the payment of the $9,033 or upon her interest as owner of an undivided quarter beneficial fee in the land in Duluth or on both. It follows that the decree of the probate court was wrong so far as it declared that the succession duty imposed upon Mrs. Dana's "interest under the Duluth and Gladstone Real Estate Trust" was valid.

5. It is alleged in the petition that the rate of duty depends upon the duties imposed upon all the three pieces of property being valid. It follows that the whole decree must be reversed and the case stand for hearing before a single justice.

It is so ordered.

PRIESTLEY v. BURRILL, Treasurer and Receiver General.

(Supreme Judicial Court of Massachusetts, 1918. 230 Mass. 452, 120 N. E. 100.)

Appeal from Supreme Judicial Court, Suffolk County.

Petition by Neville George De Bretton Priestley, ancillary executor of the will of Charles Homans Priestley, against Charles L. Burrill, Treasurer and Receiver General. From a decree of the probate court, respondent appealed to the Supreme Judicial Court, a single justice of which affirmed the decree and remanded the cause to the probate court, and respondent appeals to the full court. Decree of the probate court affirmed in part and in part reversed, and decree ordered as indicated.

The real estate trusts are evidenced by the following instruments: * * * [11]

De Courcy, J. Charles Homans Priestley died on September 4, 1916, domiciled in England. The petitioner, who is the ancillary executor of his will, has brought this petition to determine whether certain shares in trusts of Massachusetts real estate are subject to a legacy and succession tax.

Undoubtedly these shares constitute property within the jurisdiction of the commonwealth, and would have been taxable to nonresidents before the enactment of St. 1912, c. 678. Peabody v. Treasurer and Receiver General, 215 Mass. 129, 102 N. E. 435. That stat-

[11] Part of the statement of facts is omitted.

ute, continued by St. 1916, c. 268, § 1, confined the tax in case of nonresident decedents, to "real estate within the commonwealth, or any interest therein." If the shares owned by this nonresident decedent, constitute real estate or an interest therein they are taxable, but not otherwise.

In the recent case of Dana v. Treasurer and Receiver General, 227 Mass. 562, 116 N. E. 941, the question arose whether similar shares in the Amoskeag Manufacturing Company and the Boston Ground Rent Trust (two real estate trusts), were real or personal estate or partly each. The beneficial interest in the trust was divided into transferable shares; the real estate and personal property constituted one trust fund, and it was expressly provided that at the termination of the trust the trustees should liquidate the assets and distribute the same among the shareholders, but there was no provision authorizing the trustees to divide the real property among them. It was held that the real estate was to be considered as converted into personal estate from the beginning, and that consequently the shares were personal property.

As respects the shares in the Homans Real Estate Trust and the share in the Boston Real Estate Trust, the present case cannot be distinguished in principle from the Dana Case. The essential facts are similar, and the general scheme of each of these trusts worked a conversion of all the property of the trust into personalty as one fund from the outset. The deceased testator had no interest in the real estate which would go to his heirs, but an interest in the net proceeds of the trust fund, after the sale of all the property. Indeed the Homans Real Estate Trust Agreement expressly provided that "shares hereunder shall be personal property." We are of opinion that these shares, belonging to the estate of a nonresident, and not constituting any interest in real estate, are not subject to a succession tax.

In the trust agreement of the Warren Chambers Trust, however, there is no such imperative requirement that the property shall be sold, and the proceeds distributed among the shareholders. The trustees may transfer the property to a corporation if instructed by the shareholders to organize one; but they are authorized to sell the property at the expiration of the trust only in default of action relative thereto by the shareholders. The agreement contains no provision that the shares shall be personal property as to title, whatever the legal effect of such a clause may be. See Peabody v. Treasurer and Receiver General, 215 Mass. 129, 130, 102 N. E. 435. That there was no equitable conversion of this real property into personalty at the creation of the trust, or at the death of the testator, is virtually settled by the decision in the Dana Case relating to the Duluth and Gladstone Real Estate Trust.

This trust agreement, in our opinion, created a partnership relation among the certificate holders, as distinguished from a pure trust. They are associated together, have a fixed annual meeting, and special

meetings upon the written request of the holders of one-tenth of the shares; they are empowered to fill any vacancy existing in the number of trustees, and may remove any or all of them and elect others in their place. After the erection of the new building the trustees can incur no debt or liability except such as may be incidental to the management of the property held by them, and then only for an amount not exceeding in the aggregate at any one time ten thousand dollars; they are specially authorized to mortgage the premises purchased and the buildings they may erect thereon for a specified amount but not for a larger amount; and no sale of the real estate can be made by them unless authorized by vote of the shareholders. In short the certificate holders are associated together, they control the property, and for convenience have placed the legal title to it in trustees as their managing agents. Williams v. Milton, 215 Mass. 1, 102 N. E. 355.

Under the Massachusetts rule, while partnership real estate is personalty so far as necessary to pay the debts of the firm, it is real property for all other purposes. The decedent, as one of the partners, had a beneficial or equitable interest in the real estate of the Warren Chambers Trust; and however that interest may be defined, it was "real estate within the Commonwealth or any interest therein," and as such was subject to a succession tax by the express terms of St. 1909, c. 490, part 4, § 1, as amended by St. 1912, c. 678, and St. 1916, c. 268. Kinney v. Treasurer and Receiver General, 207 Mass. 368, 93 N. E. 586, 35 L. R. A. (N. S.) 784, Ann. Cas. 1912A, 902; Kennedy v. Hodges, 215 Mass. 112, 102 N. E. 432; Peabody v. Treasurer and Receiver General, 215 Mass. 129, 131, 102 N. E. 435; Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009. See Hawkridge v. Treasurer and Receiver General, 223 Mass. 134, 111 N. E. 707.

It is strongly urged by the petitioner that great practical difficulty will arise by applying to such an association as the Warren Chambers Trust the rule applicable to ordinary partnerships. See Wilcox v. Wilcox, 13 Allen, 252. But those results legally follow from the partnership form of organization voluntarily adopted by the parties. The court has no power to suspend the operation of the established rules of law applicable to partnership real estate, and the interest of the individual partners therein, where the agreement does not provide for the equitable conversion of the real into personal estate. If what is desired in order to carry out the purposes of a real estate trust is an organization with a distinct entity, intermediate between a corporation and a partnership or pure trust, and with its own rights and obligations, the Legislature and not the courts must be resorted to. Wrightington on Unincorporated Associations, 78.

The decree of the probate court is affirmed so far as it relates to the shares of the Homans Real Estate Trust and the share of the Boston Real Estate Trust. As to the shares of the Warren Chambers Trust the decree is reversed, and a decree is to be entered declaring

that so much of these shares as represents an interest in real estate owned by the Warren Chambers Trust is subject to a succession tax under the statute.

Decree accordingly.

HOME LUMBER CO. et al. v. HOPKINS, Atty. Gen., et al.

(Supreme Court of Kansas, 1920. 107 Kan. 153, 190 Pac. 601. 10 A. L. R. 879.)

Original mandamus proceedings by the Home Lumber Company, a trust estate, and J. K. Stanland and others, as trustees of such estate, against Richard J. Hopkins, Attorney General of the state of Kansas, and others, composing the State Charter Board of the state of Kansas, to compel the board to consider plaintiff lumber company's application for permission to sell its stock in the state and to find whether plaintiff had complied with statutes and is entitled to sell its stock within the state.

JOHNSTON, C. J.[12] This proceeding was brought by the plaintiff to compel the state charter board to consider its application for permission to sell its stock and securities within the state, and to find and determine whether the plaintiff had complied with the statutes of the state and is entitled to dispose of securities and stock in Kansas. The plaintiff, an unincorporated association, submitted its agreement or declaration of trust under which it was organized and its plan of operations to the charter board, with a request that it be permitted to sell its stock and securities within the state. That tribunal concluded that the agreement created a partnership and was not such an organization as was entitled to sell securities and stock in Kansas, because the agreement created partnership liabilities and the plan of business was inequitable and unfair. The board therefore declined to investigate or consider the solvency of the company, whether its plan of business was otherwise honest and fair to investors, its advertising matter free from deception, and whether or not the reasonable value had been placed upon the assets of the company which was offered in exchange for property and securities. Having determined that each shareholder became liable as a copartner and that the business of the sale of its securities and stock was to be conducted upon a plan regarded to be unfair and inequitable, the board deemed it unnecessary to proceed further with the investigation.

The first and principal question presented for determination is whether the company as organized constitutes a partnership. If the shareholders are not partners liable for the debts of the company, and the business contemplated is not contrary to law or public policy, it was the duty of the charter board to investigate and determine the merits of the plaintiff's application. The agreement is a declaration

[12] Parts of the opinion are omitted.

of trust in which parties transfer to trustees certain property interests, and for the purpose of defining the interest of each subscriber in the estate the trustees were to issue negotiable certificates of shares to the extent of 150,000, each of the value of $1, and which they might, if they deemed it expedient, increase to 1,000,000 shares. They engaged to use the property and proceeds of the shares sold in a general manufacturing, mercantile, or commercial business, in any and all of its branches, to buy, sell, hypothecate, or otherwise deal in bonds and stocks, debentures, notes, and all forms of obligations of corporations, countries, states, counties, and municipalities or persons. In fact they were authorized to buy, sell, and deal all kinds of property and to carry on all kinds of business not inconsistent with law. It was stipulated that the trustees should not be less than three nor more than five in number, to be elected annually by the shareholders at their meetings, and vacancies in the number of trustees are to be filled by the remaining trustees.

In respect to the functions, obligations, and liabilities of the trustees, it is provided:

"The trustees shall hold the legal title to all property at any time belonging to the trust, and shall have and exercise the exclusive management and control of the same; they shall assume all contracts for, and obligations and liabilities in connection with or growing out of, the property assigned to them by the subscriber and mentioned in the schedule filed with the trustees, also, in the management of the same, and to the extent of the value of such property and business, but not personally, shall agree to hold the subscriber and any persons associated with and acting with him harmless and indemnified from and against any loss, cost, expense, or liability upon, or by reason of, or in connection with any contract, obligation, or liability. * * *

"So far as strangers to this trust are concerned, a resolution of the trustees authorizing a particular act to be done shall be conclusive evidence in favor of such strangers that such act is within the powers of the trustees, and no purchaser from the trustees or one loaning money to the trustees shall be bound to see the application of the purchase money or other consideration paid or delivered by or from said purchaser or loaner to or for said trustee."

Other provisions in the agreement are to the effect that the trustees may make, amend, and repeal by-laws, may elect officers and appoint agents and fix their compensation, may pay themselves such compensation as they deem to be reasonable, and they shall not be liable for errors of judgment, and shall pay only such dividends as they deem advisable, the amount of such dividends to be left wholly to their discretion. The trust is to continue not longer than 20 years, and when ended the trustees are to wind up its affairs, liquidate its assets, and distribute the same among the holders of the shares according to the number of shares held by each. It was also provided that the death of the shareholder should not determine the trust nor entitle

the legal representatives of such shareholder to an accounting or to take any action in any court or elsewhere against the trustees, but that the regular representatives of the deceased shareholder should succeed to the rights of the decedent. There were further provisions that "the ownership of shares hereunder shall not entitle the shareholders to any title in or to the trust property whatsoever or right to call for a partition or division of same, or for an accounting, or for any voice or control whatsoever of the trust property or of the management of said property or business connected therewith by the trustees. The trustees shall have no power to bind the shareholders personally, and the subscriber and his assigns and all persons and corporations extending credit to, contracting with, or having any claim against the trustees shall look only to the funds and property of the trust for payment under such contract or claim, or for the payment of any debt, damage, judgment, or decree, or of any money that may otherwise become due or payable to him from the trustees, so that neither the trustees nor the shareholders, present or future, shall be personally liable therefor. In every written order, contract, or obligation which the trustees shall give or enter into, it shall be the duty of the trustees to stipulate that neither the trustees nor the shareholders shall be held for any personal liability, under or by reason of such contract, order, or obligation."

As will be observed, the title as well as the exclusive management and control of the property of the trust are absolutely vested in the trustees. The shareholders have no voice or control in the property or its management and no right even to call for an accounting by the trustees. They can exercise no authority as individuals nor in association except to elect the trustees, and when new trustees are elected they have the same absolute authority and control that are specified in the declaration of trust. It is expressly stated that no personal liability of a shareholder can arise by reason of any contract the trustees may make, any obligation they may assume, or any judgment rendered against them, and to put the matter of personal liability beyond cavil it is provided that in every written order, contract, or obligation, given or entered into by the trustees, they are required to write into it the provision that the shareholders as well as the trustees shall be free from any personal liability. Under the declaration all persons extending credit to the trustees or entering into contracts with them must look alone to the funds and property of the trust estate for payment.

Whether an agreement committing the possession and control of property to trustees for the benefit of shareholders creates a trust or partnership depends upon the interest transferred and the extent of the control given to the trustees. If the title is transferred to them and they are given the exclusive power to act as principals in the management of the trust property, a true trust is created, but, if the shareholders are coproprietors and the trustees are subject to the con-

trol of the shareholders in the management of the trust, it is deemed to be a partnership. Such a test has been applied in Massachusetts, where a large volume of business is done under trust agreements. The cases of Hoadley v. County Commissioners, 105 Mass. 519; Whitman v. Porter, 107 Mass. 522; Phillips v. Blatchford, 137 Mass. 510; Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284; Williams v. Boston, 208 Mass. 497, 94 N. E. 848; Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009; Priestly v. Treasurer & Receiver General, 230 Mass. 452, 120 N. E. 100—are examples of those which fall on the partnership side of the line. On the other hand, Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083, and Williams v. Milton, 215 Mass. 1, 102 N. E. 355, illustrate the type of agreements which are held to create a pure trust. In the Williams v. Milton Case there is a full discussion of the elements entering into the two classes of agreements, and the line dividing them is clearly pointed out. * * *

Another case in line with the theory of Williams v. Milton, supra, is the Wells-Stone Mercantile Co. v. Grover, 7 N. D. 460, 75 N. W. 911, 41 L. R. A. 252, where a deed of trust was executed by a debtor in which creditors joined. * * *

Still another case closely in point is Rhode Island Hospital Trust Co. v. Copeland, 39 R. I. 193, 98 Atl. 273. * * * See, also, Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; In re Associated Trust (D. C.) 222 Fed. 1012; Crocker v. Malley, 249 U. S. 223, 39 Sup. Ct. 270, 63 L. Ed. 573, 2 A. L. R. 1601; Cox v. Hickman, 8 H. C. L. 268; Smith v. Anderson, 15 Ch. Div. 247; Crowther v. Thorley, 32 W. R. 330; In re Siddall, 29 Ch. Div. 1; In re Thomas, 14 Q. B. Div. 379; In re Faure Electric Accumulator Co., 40 Ch. Div. 141; Wrightington on Unincorporated Associations, p. 49; Chandler on Express Trusts under the Common Law, p. 19.

Following the rule of the authorities, it is clear that the shareholders herein cannot be regarded as partners. They had surrendered proprietorship in the property to the trustees and have no control over it or of the business done by the company, and neither can they be held liable upon any contract or obligation of the trustees. The latter act as proprietors and principals, and conduct the business free from the control of the shareholders, and may make and change investments whenever they deem best and make or withhold dividends in their discretion. They do not take orders or directions from shareholders and are in no sense the agents of the shareholders. While stock is issued to shareholders, the shares give no right except to furnish a basis for the division of profits and for a distribution of the property and funds when the trust is concluded. The stock measures the voting strength of shareholders when trustees are elected, but the fact that they choose trustees with the powers conferred by the declaration of trust is not such control as to make the trustees their agents or give the shareholders the character of partners. It follows that the state

charter board was not warranted in denying the application of the plaintiff upon the ground that it was a partnership.

It does not follow, however, that the plaintiff as organized is entitled to a permit to sell its stock and securities even if it is found to be solvent, its assets substantial and sufficient, and its plan of business such as would be fair and equitable towards investors. To meet the requirements of our law the company must bring itself within the rules applicable to corporations and conform to the regulations imposed by statute on corporations. The Constitution expressly provides that "the term 'corporations,' as used in this article, shall include all associations and joint-stock companies having powers and privileges not possessed by individuals or partnerships; and all corporations may sue and be sued in their corporate names." Const. art. 12, § 6.

The first section of article 12 provides that corporations may be created under general laws, and that no special act conferring corporate powers may be passed by the Legislature. It requires no argument to show that the plaintiff has and is proposing to exercise powers and privileges not possessed by individuals and copartnerships. There is first the limited liability under which both shareholders and trustees are exempted from all personal liability. The corpus or joint property is to be continued during the existence of the trust freed from the rules of joint tenancy or tenancy in common, and the organization is not dissolved by the death of a shareholder or trustee. The interest of the shareholder is represented and measured by negotiable shares of stock, which gives voting power much the same as does corporate stock. A common seal is to be adopted and used substantially as is done by corporations, and the trustees "may elect officers who shall have the authority and duties usually incident to like officers in corporations." It is not necessary to the validity of the action of the trustees that there should be a concurrence of all of them, but it is provided that a majority of those present and voting at any meeting shall be sufficient. Other provisions already mentioned give the company powers and privileges beyond those possessed by individuals and partnerships, and within the rule of the Constitution the organization is to be regarded as a corporation. Many statutory provisions have been enacted for the organization and regulation of corporations which are wholly inconsistent with the organization and plan of the plaintiff company, and with which it will manifestly be unable to conform. For this reason the writ of mandamus applied for is denied.

BURCH, MASON, PORTER, WEST, and MARSHALL, JJ., concurring.

DAWSON, J., dissenting.

On Motion for Modification.

JOHNSTON, C. J. The plaintiff asks for a modification of the decision and judgment formerly rendered as to the right of the plaintiff to sell its stock in Kansas, or rather as to the duty of the state charter board to examine and pass upon its application to sell shares of stock

in the state. From expressions employed in the pleadings and briefs of the plaintiff, it was assumed that the application filed with the state charter board asked permission to sell not only shares of stock but other securities as well. As one of the purposes for which the company is organized is to buy, sell, and hypothecate bonds, debentures, notes, obligations, and other securities issued by private and public corporations and individuals, it was assumed that plaintiff was asking for permission to carry on the business of dealing in securities in Kansas. It now appears that it is not asking for permission to do business in the state, but only that it may sell shares of its stock within the state. Because of this misapprehension, some language was used at the close of the former opinion that was not appropriate to the real question involved.

The principal controversy which divided the parties was whether the plaintiff as organized was a true trust or a partnership, and it was determined that the trust agreement created a trust, and that the shareholders are not under any partnership or personal liability for the obligations or indebtedness of the trust. Upon a somewhat cursory examination the state charter board decided that the plaintiff was a partnership and that the shareholders were personally liable for the debts of the trust, and therefore declined to go further in the examination of the application or to pass upon its merits. The board assumed that plaintiff was seeking to do business in Kansas under an organization not recognized in the state. The permission sought, however, was not admission into the state for the purpose of doing business, and was no more than an opportunity to sell shares of stock with a view of raising money on which to do business. The general holding of the courts is that the doing of business is the exercise of some of the functions and the carrying on of the ordinary business for which the company is organized. 3 Words and Phrases, § 2155; Thompson on Law of Corporations, § 7936; Barse Live Stock Co. v. Range V. C. Co., 16 Utah, 59, 50 Pac. 630. Single and isolated transactions do not ordinarily constitute the "doing of business" (Osborne v. Shilling, 74 Kan. 675, 88 Pac. 258, 11 Ann. Cas. 319), and neither can the sale of shares or the ownership of stock of a nonresident company be regarded as within that term (Payson v. Withers, 19 Fed. Cas. 29, No. 10,864; United States v. American Bell Telephone Co. [C. C.] 29 Fed. 17).

The right of the plaintiff to have its application considered is to be determined by what it is proposing to do now, and not by what it may hereafter undertake to do. It has been rightly decided that under the Constitution the plaintiff is to be treated as a corporation, and if it should apply for permission to do business in the state it would be subject to the corporation law so far as the same is applicable to that class of corporations. Of course there are provisions of the law relating to corporations that are not applicable to companies like the plaintiff, and the Legislature has not as yet enacted statutes peculiarly applicable to that class of corporations. It will be time enough to

determine what regulations should be applied when they are imposed upon a company like the plaintiff, or when a question arises as to their right to do business in the state. Regardless of its corporate character, or even of the lack of it, the plaintiff is entitled to have its application considered by the state charter board upon its merits, and upon the theory that there is no personal or partnership liability of shareholders, the same as if the application had been made by any other person, company, or corporation. It devolves upon the board to inquire as to the solvency and responsibility of the plaintiff, the sufficiency of its assets, the trustworthiness of those representing and managing it, the fairness, honesty, and equity of its plan, the security afforded investors, that its funds will not be dissipated or misappropriated, and if it is found to measure up to the statute in these and other respects a permit may be issued to it. Laws 1919, c. 153.

Having determined that the plaintiff is not a partnership, and, further, that the proposed sale of shares in the trust is not the "doing of business," within the accepted meaning of that term, it was the duty of the state charter board to consider and pass upon the merits of plaintiff's application, and the writ of mandamus as prayed for will therefore be issued.

All the Justices concurring.[13]

SIMSON et al. v. KLIPSTEIN.

(District Court of the United States, D. New Jersey, 1920. 262 Fed. 823.)

At Law. Action by Leslie N. Simson and George W. Hunter, trustees, against Ernest C. Klipstein. On motion to dismiss for want of jurisdiction.

DAVIS, District Judge.[14] Defendant in the above-stated cause moved to dismiss the same on the ground that this court is without jurisdiction because one of the necessary parties plaintiff and the defendant are both citizens of the state of New Jersey. The defendant further asks permission to take testimony to establish the citizenship of the said necessary party and for an order adding the name of said party plaintiff to the complaint.

On March 15, 1916, the plaintiffs, Simson and Hunter, by an instrument purporting to be a declaration of trust, called "Articles of Association of Midvale Chemical Works," established a proposed trust and constituted themselves trustees thereof. Their plan contemplated

13 It has been held that associations formed under declarations of trust are "companies," within the meaning of Blue Sky Laws. People v. Clum, 213 Mich. 651, 182 N. W. 136, 15 A. L. R. 253 (1921); Schmidt v. Stortz, 208 Mo. App. 439, 236 S. W. 694 (1922).

14 Part of the opinion is omitted.

that, as trustees of the Midvale Chemical Works, the name of the proposed trust, persons would give to them money, in return for which they would issue certificates entitling the holders thereof to share in the profits resulting from their management of the enterprise upon which they were to embark with said money. The certificate holders were the beneficial owners of the money contributed by them, in that they were to share in the profits earned and in the final distribution of the assets of the association, in accordance with the terms of the articles of association. According to said terms, however, the legal and equitable title to the property is vested in the said trustees.

The trustees purchased at Elizabeth, N. J., some considerable real estate and established and operated a factory thereon, wherein aniline oil, etc., was manufactured. On May 31, 1917, the "Midvale Chemical Works, by George W. Hunter, Leslie N. Simson, trustees," entered into an agreement with the defendant for the sale to him of said real estate and factory for the sum of $150,000, and also for the personal property, including the raw materials on hand, an inventory of which the plaintiffs allege, showed it to be worth about $45,000 in addition. The defendant entered into possession of the property, but it developed that the said trustees could not give a clear title to the real estate and the defendant refused to accept a deed for the same. During the time title to said real estate was being determined by litigation in the Court of Chancery of New Jersey, the defendant continued in possession of the property and operated the factory. For his alleged failure to pay for the personal property and raw materials, for his refusal to remove from the premises at the termination of the litigation in accordance with the terms of an agreement entered into while litigation was going on, and for damages alleged to have been done to the said property while in possession of defendant, plaintiffs brought this action against him to recover the sum of $141,870.78. The defendant is before this court on motions as aforesaid.

Whether or not an association is a trust or partnership depends upon the instrument creating it. Real estate trusts, such as this claims to be, have arisen principally in Massachusetts and Missouri. Upon a careful examination of the articles of association of the Midvale Chemical Works and of the cases bearing upon this question, I am of the opinion that the Midvale Chemical Works is a partnership. The test is the power of control of the management of the association. If the certificate holders have the power of control, the association is a partnership; if they have not, and the power of control is in the trustees, it is a trust. "The distinction," said Judge Morton, in the case of In re Associated Trust (D. C.) 222 Fed. 1012, "between the two turns upon the provisions of the trust agreement or declaration. In cases where by the declaration of trust, the shareholders are given substantial control of the management of the trust property, the trust is held to be a partnership; in cases where shareholders have no such control, the trust is held, for the purposes of taxation, to be of the

same sort as the usual testamentary trust, and not to be a partnership." Hoadley v. County Commissioners, 105 Mass. 519; Whitman v. Porter, 107 Mass. 522; Gleason v. McKay, 134 Mass. 419; Phillips v. Blatchford, 137 Mass. 510; Ricker v. American Loan & Trust Co., 140 Mass. 346, 5 N. E. 284; Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083; Williams v. Boston, 208 Mass. 497, 94 N. E. 808; Williams v. Milton, 215 Mass. 1, 102 N. E. 355. * * *

It was held in New Jersey that the mere sharing in profits would make persons partners as to third parties, even though there was no intention to become partners. Sheridan v. Medara, 10 N. J. Eq. 469, 64 Am. Dec. 464; Voorhees v. Jones, 29 N. J. Law, 270. Later this rule seems to have been modified, so that profit sharers must have the power of control, in order to constitute them partners. Wild v. Davenport, 48 N. J. Law, 129, 7 Atl. 295, 57 Am. Rep. 552. It is not necessary that the power of control should be actually exercised for partnership to exist. It is sufficient if the power is given, though never exercised. In re Associated Trust (D. C.) 222 Fed. 1012, supra. This would follow as a necessary corollary from the statement that whether or not a partnership exists, rather than a trust, depends upon the terms of the creative instrument, the trust declaration, for it could not be determined from the examination of such instrument whether or not the power given by it had been exercised.

Power of control in the case at bar is given to the certificate holders in the articles of association. By articles X and XI a meeting may be called at any time, and the certificate holders may amend any and all of the articles of the association, except in three particulars, not essential to the substantial control of the association or the management of the property thereof. In article II, it is provided that "the trustees shall have the power to contract and carry on in the name of, and for the association any business which could be lawfully conducted or carried on by an individual, and, in the conduct of such business, may use and invest any funds of the association and shall have full general power and authority to buy, sell, pledge, mortgage, grant, convey and exchange property of every description, real, personal or mixed," etc. Suppose at one of their meetings provided for in article XI, the certificate holders should pass a resolution amending article II, line 1, by striking out the word "trustees" and substituting in lieu thereof the words "certificate holders," the trustees would be practically stripped of their control and operation of the enterprise.

In article XXI, it is provided that "the trust here created shall terminate at the expiration of 21 years after the death of the last survivor of the above named trustees," etc. If in one of their said meetings the certificate holders should pass a resolution amending the said article, so that the trust should terminate forthwith, the trustees would be powerless and the trust would come to an end. The trustees have no vote in such matters, nor have they, so far as the facts before me disclose, any capital of their own in the enterprise to protect.

It is evident that the power of control of the management is in the certificate holders, and may at any time be exercised by them, notwithstanding any opposition the trustees might offer. The certificate holders are associated together by the terms of the creative instrument. The association is therefore a partnership, and not a trust.

Does it thereupon follow, as contended by the defendant, that the names of the certificate holders should be added as parties plaintiff, one of whom, it is alleged, is a citizen of New Jersey, which fact ousts this court of jurisdiction? It should be noted that the association is a partnership, the certificate holders themselves being the partners, and not, as defendant seemed to think, partners with the trustees, who are not certificate holders. There is, therefore, no trust here, and strictly speaking no trustee. The so-called trustees represent the certificate holders. The certificate holders are principals, and the trustees, the plaintiffs, are their mere "managing agents." By whatever name, however, they are designated, there can be no doubt that they have full authority to represent the certificate holders and bind them in all transactions touching the property. It will be recalled that by article II the "trustees" "have full general power and authority to buy, sell, pledge, mortgage, grant, convey, and exchange property of every description, * * * and do all things necessary to the conduct of the business which they may undertake." It is further provided in article IV that "the trustees shall be deemed the absolute owners of all the property of the association and both the legal and equitable title to all such property shall be vested absolutely in them."

The defendant in all his dealing with the plaintiffs, has regarded and accepted them as accredited authoritative agents of the certificate holders, with full power to deal as they pleased with the property contributed by said certificate holders. That the present plaintiffs are the proper parties plaintiff in a suit in equity in New Jersey touching said property was decided in the case of Simson et al. v. Klipstein, 88 N. J. Eq. 229, 102 Atl. 242. The parties plaintiff and defendant were the same in that case as in the instant case and the same questions which are raised here as to proper parties were raised there, and decided against the defendant. In view of the powers conferred upon the so-called trustees or "managing agents" by the articles of the association, the recognition by the defendant of their full and unquestioned authority of the association, and the decision of the Court of Chancery of New Jersey holding that the plaintiffs are the proper parties plaintiff in a suit touching said property, I am of the opinion that Simson and Hunter are proper parties plaintiff, and have full power and authority to represent the certificate holders in this proceeding.

It is settled that the jurisdiction of federal courts depends upon the personal citizenship of the parties to the record, and not upon the citizenship of the parties whom they represent. Memphis St. Ry. Co. v. Bobo, 232 Fed. 708, 710, 146 C. C. A. 634. To put it in another way, representatives may stand upon their own citizenship in federal courts,

irrespective of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law, prohibiting the creation of federal jurisdiction by assignments, intended to obviate, was the voluntary creation of federal jurisdiction by simulated assignments made for that sole purpose. But assignments or conveyances by operation of law creating legal representatives are neither within the mischief nor reason of the law. New Orleans v. Gaines, Administrator, 138 U. S. 595, 606, 11 Sup. Ct. 428, 34 L. Ed. 1102; Mexican Central R. R. Co. v. Eckman, 187 U. S. 429, 434, 23 Sup. Ct. 211, 47 L. Ed. 245. The plaintiffs are "managing agents," having the legal and equitable title to the property in question, and are proper parties to the record, and so come within the above exception.

It appears from the complaint that Simson is a citizen of New York, and Hunter of Missouri, while the defendant is a citizen of New Jersey. This cause of action, therefore, being a controversy exceeding exclusive of interest and costs, the sum or value of $3,000, is properly in this court, and the motions of the defendant are denied. The defendant may have 20 days, after the entry of order, within which to answer.

McCAMEY v. HOLLISTER OIL CO. et al.

(Court of Civil Appeals of Texas. 1922. 241 S. W. 689.)

DUNKLIN, J.[15] George B. McCamey drilled an oil well for the Hollister Oil Company, under a contract in writing which consisted of a written proposition, dated at Fort Worth, Tex., signed by McCamey and addressed to the "Hollister Oil Company," at Fort Worth, Tex., and accepted by that company. The offer made by McCamey included his proposition to drill and certain material mentioned necessary thereto, also stating $38,500 as the price which would be charged for the work and material, and the dates for the payment of the same. * * *

McCamey instituted this suit to recover the balance due him under that contract, and the recovery was sought, not only against the Hollister Oil Company, but also against Warren H. Hollister, William Hettesheimer, and Charles J. Geiser, who were likewise made parties defendants in the suit. It was alleged that the Hollister Oil Company is a joint-stock association with its principal place of business in Fort Worth, Tarrant county, Tex.; that the defendant Warren H. Hollister, who resides in Tarrant county, is its president; that William Hettesheimer likewise resides in Tarrant county, Tex., and that Charles J. Geiser is a resident citizen of New York state, but is tem-

[15] Parts of this opinion and the opinion on motion for rehearing are omitted.

porarily residing in Tarrant county, Tex.; and plaintiff prayed for service of citation on all of the defendants to answer his petition. * * *

The defendants jointly filed an answer, consisting of a general demurrer, special exception by Hollister, Hettesheimer, and Geiser, and a general denial by all of them. The answer also contained the following special plea: "Further answering, if required defendants show that, if plaintiff is entitled to any relief whatsoever, it is against the defendant Hollister Oil Company, and its trustees and the assets of said company in their hands, and not against the other defendants personally; that at all times mentioned by plaintiff said Hollister Oil Company was a common-law trust, and the other defendants contracted with plaintiff in their capacity as trustees only and not as individuals or personally; that, under the declaration of trust of said Hollister Oil Company, plaintiff is required to look alone to the property and funds of said company, and not to the trustees or certificate holders for his debt, if any; and the defendants Hollister, Hettesheimer, and Geiser, specially denying plaintiff's allegations of partnership, therefore show that in no event is plaintiff entitled to recover against them."

The case was tried before the court without a jury, and judgment was rendered in plaintiff's favor against the "Hollister Oil Company, a trust estate," for the sum of $23,385.50, together with the foreclosure of the lien prayed for in plaintiff's petition on defendants' leasehold interest in the land upon which the well was drilled, together with the machinery, supplies, and all personal property and improvements placed on the lease by the defendants. But the plaintiff was denied a recovery of personal judgment against the defendants Hollister, Hettesheimer, and Geiser for the debt for which he sued. From the judgment so rendered in favor of the individual defendants last mentioned, the plaintiff has prosecuted this appeal. * * *

The trial judge filed his conclusions of law upon which his judgment was based, and which are as follows:

"1. I construe the declaration of trust under which the Hollister Oil Company was operating and doing business to have created and constituted a common-law trust of the type generally known as a 'Massachusetts Trust.'

"2. I find that the declaration of trust under which the Hollister Oil Company was operating did not constitute a joint-stock association; and therefore I further find that neither the trustees nor the shareholders of the Hollister Oil Company were personally liable for the debts and contracts of the Hollister Company.

"3. I find that plaintiff is entitled to recover of the Hollister Oil Company the sum of $23,385.50, but I further find that plaintiff is not entitled to recover anything from W. H. Hollister and William Hettesheimer and Charles J. Geiser as shareholders of said Hollister Oil Company.

"4. I further find that the plaintiff, George B. McCamey, is entitled to a judgment foreclosing his contractor's lien which he filed and perfected against the property of the Hollister Oil Company, which lien is fully set out in plaintiff's petition."

The trial was upon the theory and assumption that the Hollister Oil Company was not incorporated under the laws of this state, and also upon the assumption that the plaintiff, McCamey, in entering into the contract was not chargeable with notice that the company was doing business under a declaration of trust of the character set out above; and, since the case has been briefed here upon the same assumption, we shall consider it upon the theory that the facts so assumed are true. Penn v. Brisco County (Tex. Civ. App.) 162 S. W. 916; 3 C. J. pp. 735, 838.

Appellant in his brief presents these three propositions as the basis for his contention that the judgment should have been rendered in his favor against the defendants Hollister, Hettesheimer, and Geiser individually, as well as against the Hollister Oil Company:

"(1) The declaration of trust under which the Hollister Oil Company was organized, certain articles of which conferred on the members or shareholders thereof powers of control over the officers or trustees of the Hollister Oil Company, created a joint-stock association; and the court erred in failing and refusing to so hold.

"(2) The appellees Hollister, Hettesheimer, and Geiser, who were members and shareholders of the Hollister Oil Company, which was a joint-stock association under and by virtue of certain provisions of its declaration of trust, were personally liable for the debt due appellant by the Hollister Oil Company; and the court erred in not so holding.

"(3) Granting that the court did not err in holding that the declaration of trust creating the Hollister Oil Company constituted a common-law trust of the type generally known as a 'Massachusetts trust,' yet the court erred in failing and refusing to render judgment for appellant against Hollister and Hettesheimer, who the undisputed evidence showed were trustees and who the undisputed evidence showed had not expressly exempted themselves from personal liability in their contract with appellant."

The plan of transacting commercial, trading, and almost every other character of business for profit, under articles of trust of the general type of that set out above, was first adopted and put in use in America in the state of Massachusetts, and by reason of that fact such associations are usually denominated "Massachusetts Trusts," although sometimes also called "business trusts," "common-law trusts," "voluntary associations," etc. The business planned and transacted under the declaration of trust in the present suit was designed and intended solely for profit to the shareholders in the association to the same extent as if the same business had been carried on under a copartnership agreement or a contract which would constitute the associa-

tion a joint-stock company under the common law. The chief purpose of the selection of that form of contract as a basis for the transaction of business was to avoid personal liability of the shareholders for the legal obligations which may be incurred by the association in the transaction of the business proposed, and for which obligations such beneficiaries would be personally liable if the same business is transacted under a partnership or joint-stock agreement. * * *

The rules of equity jurisprudence applicable to trust estates generally constitute the foundation stone upon which the plan of operation of such an association is founded. By embodying in the articles of association stipulations that the legal title to all assets belonging to the association, or which may be acquired by it in the future, shall be vested in the trustees named with full power to dispose and deal with them at will and to carry on the business planned, all free of control or interference by the shareholders, it is sought to make such trustees a legal entity and an independent party to the contract, separate and distinct from the body of shareholders as another party, and thus to avoid the legal relation of principal and agent between those two parties, and also to avoid any warranted inference of a copartnership or joint-stock relation. Originally, three parties were necessary to the creation of an express trust, as evidenced by a definition quoted by Mr. Perry, in his work on Trusts (volume 1, § 2), from Starr's Institutions of the Laws of Scotland, as follows: "A trust is in the nature of a deposition by which a proprietor transfers to another the property of the subject intrusted, not that it should remain with him, but that it should be applied to certain uses for the behoof of a third party."

That definition applies to a testamentary trust. However, the definition adopted by the author is sufficiently comprehensive to embrace all manner of trusts, including not only express trusts but also implied trusts, resulting trusts and constructive trusts, which seem to have been created by courts of equity after the doctrine of express trust had first obtained. The author defines a "trust" as "an obligation upon a person arising out of a confidence reposed in him to apply property faithfully and according to such confidence." And in section 24 the author states that implied, resulting, and constructive trusts are predicated upon a judicial presumption arising out of the language of an instrument or transaction of the parties or some fiduciary relation between them that a trust was intended by them. Id. §§ 25, 26, and 27. When there are three parties to an express trust, for example a testamentary trust, the cestui que trust takes no part in its creation, and the benefits he receives do not arise from a contract on his part, nor does he have any voice in the management of the estate by the trustee. Under such conditions, it is clear that he cannot be held liable personally for debts incurred by the trustee. For a like reason the beneficiary of an implied trust, a resulting trust, or

a constructive trust, is not personally liable for obligations incurred by the trustee.

It is essential to the creation of an express trust that the legal and equitable titles be separated, and that the legal title be vested in the trustee and the equitable title in the cestui que trust; and the authorities all agree that, when both of these titles unite in the same person, the trust terminates. It is also true that the settlor in such a trust ordinarily cannot be a trustee also, although under some circumstances he may occupy the dual relation of settlor and beneficiary or cestui que trust. * * *

The difficulty incident to formulating a plan of doing the ordinary commercial or trading business by means of a declaration of trust, of the Massachusetts type, for the sole purpose of profit to shareholders and at the same time escape the statutory restrictions, regulations, and burdens applicable to private corporations and also the liability of shareholders for the debts contracted by trustees for the benefit of the association, has given rise to much fine reasoning and many technical discriminations. The decisions of the Supreme Court of Massachusetts relative to such companies have been followed with approval in a majority of the states in which that plan of business has been recognized as valid and effective for the purposes intended. We shall not undertake a lengthy discussion of those decisions, or of the decisions of other states which have followed them. In the case of Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009, it was said that the test for determining whether a declaration of trust of the character now under discussion creates a trust or a partnership "depends upon the way in which the trustees are to conduct the affairs committed to their charge. If they act as principals and are free from the control of the certificate holders, a trust is created, but if they are subject to the control of the certificate holders, it is a partnership." That test seems to have been recognized as a correct test in all of the decisions of that state and also by the decisions of other states following them. In that case the association was held to be a partnership because the shareholders were given power to remove the trustees at any time, to fill vacancies, to terminate the trust at will, and to amend the declaration of trust. In the case of Williams v. Inhabitants of Milton, 215 Mass. 1, 102 N. E. 355, which is one of the leading cases of that state and in which the former decisions of the same court are discussed and reviewed at length the instrument under discussion was held to create a trust and not a partnership. * * *

In Dana v. Treasurer and Receiver General, 227 Mass. 562, 116 N. E. 941, it was held that a declaration of trust providing for meeting of stockholders with power at such meetings to elect trustees and to alter or amend the declaration of trust created a partnership. See, also, Priestley v. Treasurer and Receiver General, 230 Mass. 452, 120 N. E. 100. * * *

We shall not undertake a further review of those decisions. In many of them the trust agreements were held to constitute partnerships, while others were held to constitute trusts. The powers given to the trustees in the different instruments vary, and no two instruments were drawn in the same language. See, also, Simson v. Klipstein (D. C.) 262 Fed. 823; In re Associated Trust (D. C.) 222 Fed. 1012; Baker-McGrew v. Union Seed Fertilizer Co., 125 Ark. 146, 188 S. W. 571. * * *

As will be seen from a reading of the declaration of trust in the present suit, all the title to assets and all the powers of control over them and all power and authority to transact the business in hand are conferred solely by the terms of that instrument. Those powers were delegated by the owners of the beneficial interests in the trust, who by subdivision 6 of article XVII, of the trust agreement reserved the power to alter or amend the articles of association in any manner they might deem expedient. That contractual right to alter or amend, to which the trustees assented, unquestionably included the power to limit and restrict the control of the trustees over the assets and the conduct of the business to any extent that reasonably may be supposed, even though the legal title be permitted to remain in the trustees. And, as said in some of the decisions, the articles of association must be looked to to determine the question of power of the shareholders to control the action of the trustees, even though the power is never exercised. Accordingly even if the test announced by the Massachusetts decisions, namely, the right of the trustees to full control, be accepted as the correct criterion for the determination of the issues presented in the present suit, we think it clear that the articles of association in controversy in this suit did not create a trust, but did create a joint-stock company, and that defendants Hollister, Hettesheimer, and Geiser by reason of being shareholders in the association are individually liable as partners to plaintiff for the debt sued for, and that judgment should have been rendered against them therefor. * * *

The statutes relating to corporations and limited partnerships are the only statutes in this state which provide for and allow a limitation of the individual liability of the members of any association of persons formed to transact business for profit for the debts legally incurred by the association. Under the rule, "Expressio unius est exclusio alterius," the statutes relating to limited partnerships imply a denial of the right of members of a partnership to limit their liability, under the common law in any other manner, since "that which is implied in a statute is as much a part of it as what is expressed." Sutherland on Statutory Construction, § 334; 25 R. C. L. § 229, pp. 982, 983; 36 Cyc. 1122, 1145. And the statutes referred to upon the subjects of Corporations, Limited Partnerships, and Unincorporated Joint-Stock Companies or Associations, all considered together reflect the public policy of this state and indicate a legislative inten-

tion to include unincorporated joint-stock companies of every character which are organized for profit within the class of those mentioned in the statutes.

The articles of association of the Hollister Oil Company come strictly within the definitions of "joint-stock company," quoted above. The fact that the plan adopted to appoint trustees clothed with the powers and title specified as a convenient means for the accomplishment of the purpose for which the organization was formed, namely, profit to the shareholders, did not make the association any the less a joint-stock company. Hence we are of the opinion that the appellees were liable for the debt in controversy, under and by virtue of those statutes relating to unincorporated joint-stock companies or associations. Wells v. Mackay Telegraph-Cable Co., decided by the Court of Civil Appeals of the First Supreme Judicial District December 17, 1921, not yet [officially] published, 239 S. W. 1001, and other decisions there cited.

If for any possible reason it can be said that neither a partnership nor a joint-stock company was created by the articles of the association in controversy, nevertheless the shareholders are liable for the debt sued for under the rules of law applicable to the relation of principal and agent. A partnership or joint-stock company could have been organized for the purpose of transacting the same business that was transacted under the declaration of trust. Manifestly, it would be unjust to visit upon the plaintiff the loss of labor and material furnished by him as a creditor for the benefit of the shareholders in that association, when the debt was contracted for their benefit by persons called trustees and clothed with express authority from the shareholders to incur it; and the injustice of such a result is the basic principle of individual obligation imposed by law upon each member of a partnership or joint-stock company to answer for all the debts of the firm or company. To allow the accomplishment of such an injustice through a resort to the rules of equity by the substitution of a trust agreement for a partnership or joint-stock agreement would be to violate the most vital, fundamental principle of the whole doctrine of equity jurisprudence. The right to create an express trust is subordinate to those fundamental principles, and, if an attempt be made to create an express trust which is obnoxious to those principles, the same must fail, and the relation of partnership, joint-stock company, or principal and agent necessarily arises under the rules of the common law. Such, in effect, was the decison of our Supreme Court in the case of Sergeant v. Goldsmith, 110 Tex. 482, 221 S. W. 259, 10 A. L. R. 742, in an opinion by Chief Justice Phillips.

And this vice in the declaration of trust in controversy is a further reason why it should be held to create a partnership or a joint-stock company rendering the shareholders liable as partners, if it is otherwise susceptible of that construction, and that, too, in the absence of the statutes relating to unincorporated joint-stock companies. Equity

is more just than the law. 1 Pom. Eq. Jur. § 67. In order to reach the ends of justice, it often relieves against the hardships of the rigorous rules of law: but it can never be used as instrumentality to work an injustice. In this connection attention is called to the terms of the declaration of trust of the Hollister Oil Company in which the nonliability of shareholders is stressed with great emphasis, notwithstanding general and sweeping authority is conferred upon the trustees to contract every character of indebtedness for their benefit, and containing every element of agency on the part of the trustees to bind the shareholders for the debts created, with the exception of the use of the word "trustees" instead of the word "agents," or language creating such agency. There is no magic in the word "trustees" which necessarily excludes the idea of agency. Even the Massachusetts courts recognize that as true, as reflected in those decisions in which declarations of trust were held to create partnerships. "Equity looks to the intent rather than to the form," is one of the maxims of equity. 1 Pom. Eq. Jur. § 378. See, also, 1 Mechem on Agency, §§ 42, 43, and the decisions and authorities noted in support of the text.

The question of the right to exclude individual liability on the part of the shareholders by a special contract with the creditors is not involved in this case.

For the reasons indicated, the judgment of the trial court denying appellant a recovery against appellees Hollister, Hettesheimer, and Geiser is reversed, and judgment is here rendered in favor of appellant against them jointly and severally for the debt sued for; but execution shall not issue against their individual property, until execution be issued against the property of the Hollister Oil Company, and returned without satisfaction.

The judgment in appellant's favor against the Hollister Oil Company is left undisturbed.

Reversed and rendered in part; undisturbed in part.[16]

Buck, J. I concur in the judgment of this court as expressed in the opinion of Justice Dunklin, but I do not think it is necessary to

16 With respect to a declaration of trust which, among other provisions, authorized the holders of a majority of the common shares to remove any trustee and to appoint a new trustee, and conferred upon such certificate holders, with the consent of the trustees and upon a two-thirds vote of the common shareholders to amend or alter the declaration of trust, except as regards the provisions for the nonliability of the trustees and the certificate holders and those concerning the preferred shares, it was held, on a bill filed for instructions by an executor and trustee, who held under the terms of the will 625 shares of the preferred shares in such association, that "such agreement evidences both in intention and in law a true trust and not a partnership." The court continued: "It is therefore our decision that, under said agreement, the persons interested therein, the holders of the so-called preferred stock, are not under individual and personal liability for any of the obligations or indebtedness of the said trust or association, * * * and that the complainant as executor and trustee can continue to hold said shares of preferred stock without making itself liable in its own corporate capacity for any obligation or indebtedness of said trust or association." Rhode Island Hospital Trust Co. v. Copeland, 39 R. I. 193, 98 Atl. 273 (1916).

hold that the policy of this state, as reflected by our statutes and the opinions of our courts, precludes the organization of a trust estate in which the shareholders are not liable for its debts. Upon this question, at this time, I express no opinion. I do think that the declaration of trust here shown does not come within the Massachusetts trust, upheld by the Supreme Court of Massachusetts, since the shareholders by a majority vote have the right to amend or alter the declaration of trust, and thus could deprive the trustees of their right to manage the affairs of the trust independent of the shareholders.

BETTS et al. v. HACKATHORN.

(Supreme Court of Arkansas, 1923. 159 Ark. 621, 252 S. W. 602.)

Action by W. M. Hackathorn against A. L. Betts and others. Judgment for plaintiff, and defendants appeal.

HUMPHREYS, J. Appellee instituted suit against appellant in the circuit court of Hempstead county, to recover $180 for goods sold and delivered to the Hope Oil Trust, a concern doing business under a written declaration commonly known as the "Massachusetts Trust." The suit is based upon an allegation that the Hope Oil Trust is a partnership, and that appellants are members thereof, and, as such, are individually liable for the indebtedness of the concern. The six appellants first named were denominated trustees in the declaration. They filed a separate answer, admitting the amount of the account and that the goods were sold to the Hope Oil Trust, but denying individual liability upon the ground that they are exempted from liability under paragraph 21 of the declaration, which in part is as follows:

"Every act done, power exercised, or obligation assumed by the trustees, pursuant to the provisions of this agreement, or in carrying out the trusts herein contained, shall be held to be done, exercised, or assumed, as the case may be, by them as trustees, and not as individuals, and every person or corporation contracting with the trustees, as well as every beneficiary hereunder, shall look only to the fund and property of the trust for payment under such contract, or for the payment of any debt, mortgage, judgment, or decree, or the payment of any money that may otherwise become due or payable on account of the trusts herein provided for, and any other obligation arising under this agreement in whole or in part; and neither the trustees nor the shareholders, present or future, shall be personally liable therefor."

The two last-named appellants are shareholders and filed a separate answer denying liability upon the ground that under the terms of the declaration they are cestuis que trust. They claim exemption under paragraph 21, quoted above, and paragraphs 9 and 20 which are as follows:

9. "The trustees under this agreement shall have the sole legal title to all property, in any part of the United States of America, or in any foreign country, at any time held, acquired, or received by them as trustees under the terms of this agreement, or in which the shareholders under this agreement shall have any beneficial interest as such shareholders, and they shall have and exercise the exclusive management and control of the same, in any manner that they shall deem for the best interest of the shareholders, with all the rights and powers of absolute owners thereof."

20. "Shareholders hereunder shall not be liable for any assessment, and the trustees shall have no power to bind the shareholders personally."

Demurrers were filed to the separate answers and sustained by the court. Appellants stood upon their answers and refused to plead further, whereupon the court rendered judgment against them, from which is this appeal.

The appeal involves the sole question of the personal liability of the trustees and certificate owners in the business operated under the trust declaration. The instrument is long, and it would unduly extend this opinion to set it out in extenso; a statement of the substance thereof being sufficient for the purposes of this cause. In short the instrument reflects that trustees associated themselves together for the purpose of selling certificates of stock in the name of Hope Oil Trust and of using the proceeds for investment in securities and enterprises for the equal benefit of the shareholders. The trustees reserved the entire management and control of the business in themselves, the right to hold the title to all the property and dispose of same, and to elect their own successors in case of the resignation or death of either one of them. The indenture in effect provided that the trustees should be masters of the trust property as well as the business, without suggestion, supervision, or interference on the part of the stockholders. No authority or power whatever was conferred upon the stockholders. In fact all authority and control of the property and business was withheld from them. No provision was even made for a meeting of the stockholders at any time for any purpose. Under the terms of the declaration they were nonparticipants, save to share in dividends and profits that might be declared and distributed among them by the trustees. The paragraphs of the declaration exempting the shareholders from personal liability have been set out in full.

The statutes of this state provide for and regulate two kinds of business concerns, limited partnerships and corporations. The other business organizations operate in this state under the general law of the land, not under statutory protection and restrictions. General partnerships, joint-stock companies, business trusts, and other associations are not prohibited from doing business in this state. With these preliminary remarks we proceed at once to determine whether the trustees and shareholders in the Hope Oil Trust are individually lia-

ble for the account sued upon. We will first determine the liability of the trustees.

A general rule in the law of trusts is that a trustee is a principal and not an agent for the cestui que trust. It follows from this rule that the trustee and not the cestui que trust is personally responsible for an indebtedness growing out of transactions in relation to the trust estate. The creditor's guarantee is the personal liability of the trustee. We see no reason why the trustees here should be exempt from this general rule. Their declaration exempting them from personal liability cannot prevent individual liability from attaching as the law fixes the liability of trustees. According to the declaration, they are self-appointed trustees, with absolute authority over the trust business and property. The rule announced above is supported by the decided weight of authority, as will be seen by reference to the list of cases cited on page 46 of Sears on Trust Estates. It was said by the Supreme Court of the United States in the case of Taylor v. Davis, 110 U. S. 330, 4 Sup. Ct. 147, 28 L. Ed. 163, that, "when a trustee contracts as such, unless he is bound no one is bound, as he has no principal. The trust estate cannot promise, the contract is therefore the personal undertaking of the trustee. * * * If a trustee contracting for the benefit of a trust wants to protect himself from individual liability on the contract, he must stipulate that he is not to be * * * responsible, but that the other party is to look solely to the trust estate." The trustees under the terms of the indenture interposed themselves as a shield between the stockholders and creditors, and for that reason are individually liable.

We next proceed to a determination of the liability of the shareholders. The declaration not only exempts the shareholders from individual liability in specific terms, but shears them of all control and management of the business. Paragraph 9 of the indenture makes the trustees absolute masters of the property and business. The only right accorded to the holders of certificates of stock is to share in profits or dividends. They are in the attitude of one lending money to a partnership for a share of the profits in lieu of interest. A reading of the trust instrument in its entirety has convinced us that the shareholders are not associated with each other and the trustees for the purpose of conducting a business in person or through agents for a profit. There is nothing in the instrument showing an intention on the part of the shareholders to enter into a copartnership or an intention on the part of the trustees to co-operate with the shareholders in the conduct of the business. The test, after all, in determining whether a business is a partnership, is to ascertain whether the parties intended one. Buford v. Lewis, 87 Ark. 417, 112 S. W. 963; Wilson v. Todhunter, 137 Ark. 80, 207 S. W. 221; Mehaffy v. Wilson, 138 Ark. 281, 211 S. W. 148. Under the terms of the instrument the shareholders are cestuis que trust, and the instrument, in so far as they are concerned, creates a pure trust. Common-law trusts are

generally recognized and have been upheld by the weight of authority. Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Simson v. Klipstein, 88 N. J. Eq. 229, 102 Atl. 242; Rhode Island Hospital Trust Co. v. Copeland, 39 R. I. 193, 98 Atl. 273; Home Lumber Co. v. Hopkins, 107 Kan. 190, 190 Pac. 601, 10 A. L. R. 879; Wells Stone Mercantile Co. v. Grover, 7 N. D. 460, 75 N. W. 911, 41 L. R. A. 252; Mayo v. Moritz, 151 Mass. 481, 24 N. E. 1083; Foster v. Boston, 215 Mass. 31, 102 N. E. 359. Appellee insists that this court is committed to the doctrine that immunity from individual liability to shareholders in a business organization can be accomplished in Arkansas through the medium only of limited partnerships and corporations. In support of this contention two Arkansas cases are cited in which the court held the members of the organization liable as partners. Doyle-Kidd Dry Goods Co. v. A. W. Kennedy, 154 Ark. 573, 243 S. W. 66; Baker-McGrew Co. v. Union Seed & Fertilizer Co., 125 Ark. 146, 188 S. W. 571. The declaration of trust in each of those cases was quite different from the declaration in the instant case.

The question as to whether a partnership or strict trust is created by an indenture must depend on the language and provisions of the instrument involved in each case. In the Doyle-Kidd Case this court ruled that the instrument created a joint-stock company. There is a marked difference between a joint-stock company and a pure business trust. In a joint-stock company the managers are agents for the shareholders. Not so in a business trust. The managers are principals, and the shareholders are cestuis que trust. In the Baker-McGrew Case the indenture provided for shareholders to meet and elect trustees. In this way they were in a position to control and manage the business and property. We have not overlooked the case of Greene County v. Smith, 148 Ark. 33, 228 S. W. 738. In that case the question of the liability of shareholders to creditors or third persons was not involved; the only question involved being one of taxation.

The instrument in the instant case created a pure trust, in so far as appellants P. M. Simms and T. M. Kinser are concerned, and they are immune from individual liability.

The judgment is affirmed as to the trustees, and reversed, and the cause remanded as to Kinser and Simms, with directions to overrule the demurrer to their answer and to proceed in accordance with this opinion.

BANK OF TOPEKA v. EATON et al.

(Circuit Court of the United States, D. Massachusetts, 1900. 100 Fed. 8.)

Putnam, Circuit Judge. This is the same case which has already been before us on a plea in abatement, as to which we passed down an opinion and an interlocutory judgment on June 29, 1899, 95 Fed. 355. It now comes before us on demurrer. The declaration is based on a note, as follows:

"$10,000. Topeka, Kansas, October 24, 1890.

"Sixty days after date the trustee of the Topeka Land and Development Company, as such trustee under declaration of trust dated May 23, 1887, and not otherwise, promise to pay to the order of J. R. Mulvane, president, ten thousand dollars, at Bank of Topeka, Topeka, Kansas, with interest at ten per cent. per annum after maturity until paid; also cost of collecting, including attorney's fees, if suit be instituted on this note. Value received. Appraisement waived.

"F. R. Cordley, as Trustee as Aforesaid."

The defendants are certificate holders in a joint-stock association, the main purpose of which is dealing in lands in Kansas. The property of the association was vested in three trustees, the survivor of whom gave the note in suit. The articles of association referred to in the note are made a part of the plaintiff's declaration, and contain the following provisions:

"Said trustees shall have full power and authority, subject to the instructions of the shareholders, as hereinafter provided: (1) To pay all taxes and assessments of every kind legally assessed upon said property, and the necessary expenses of the trust, and for that purpose to borrow money; and any debt for money so borrowed shall be and remain, until paid, a lien upon all funds and moneys belonging to this trust then or thereafter in the hands of the trustees, in preference to the claim of any shareholders as such upon such funds and moneys. * * *

"The trustees shall have no power to bind the shareholders personally, and in every written contract or undertaking they shall enter into relating to this trust, or the property, or any part thereof, belonging thereto, reference shall be made to this declaration of trust, and the person, firm, or corporation so contracting with the trustees shall look only to the funds and property of the trust for payment under such contract or undertaking, or for the payment of any debt, damage, judgment, or decree, or of any money that may become due or payable in any way by reason of the failure on the part of the said trustees to perform such contract or undertaking, in whole or in part; and neither the trustees nor the shareholders, present or future, in the company, shall be personally liable therefor, or for any debt incurred, or engagement or contract made, by said trustees."

There is nothing further found in the articles of association or in the record with reference to the incurring of liabilities by the trustees in behalf of the association. The declaration, in addition to setting out the articles of association, states merely the facts that the note was given, that the money was advanced therefor, and that the Bank of Topeka received with the note certain securities as collateral for the payment thereof. There is nothing in the declaration showing for what purpose the money was obtained, or to what it was applied. While, therefore, it is not impossible that the trustees might have incurred indebtedness under such circumstances that the law would impose a personal liability on the shareholders, yet, under the allegations found in the declaration, there are no such circumstances; and the plaintiff's case rests entirely upon the authority expressly given the trustees to borrow money for the purposes of the trust. It not only follows that it was the duty of the plaintiff to ascertain for itself what powers the trustees had in the premises, but the specific terms of the note, in that it contains the words, "as such trustee under declaration of trust dated May 23, 1887, and not otherwise," obligated it, by its implied agreement in accepting the note, to abide by the terms of the articles of association. This expression in the note is so positive as to leave no occasion for explanation in support of this proposition, or opportunity for obviating its effect by suggestions made in argument or drawn from decisions on supposed analogous cases. Whether or not the plaintiff examined the articles of association, or knew their contents, is of no consequence, because this express provision required it to do so, or take the hazard of not doing it.

Therefore the only question is whether or not this implied stipulation of the plaintiff, limiting its remedy to the general assets of the association and the property specially pledged to it, is contrary to the rules of law. Of course, a stipulation in an instrument which fundamentally violates its essential nature must sometimes be rejected by the courts. For instance, if any individual or partnership should stipulate in his or its pecuniary obligations that he or it should not be personally liable thereon, without at the same time mortgaging or pledging property, or giving some other specific lien for security, it might be difficult for the law to regard the stipulation, because, in that event, as there would be no lien which the law could enforce, the holder of the obligation would be left without remedy, unless he could proceed by judgment against the obligor; and the result, if sustained, would be an obligation which in law is no obligation.

The present case, however, assimilates itself to the large class of cases where, certain property being pledged in some form for the security of a debt, the parties have been at liberty to stipulate that the owner of the debt should look only to the property thus pledged. In the present case, not only did the Bank of Topeka have specific assets given it for its security, but the entire property of the association was held in trust, and therefore subject to administration by the chancery

courts, which could apply it equitably and proportionally to the discharge of obligations incurred by the trustee, as contemplated by the express direction of the articles of association that the debtors of the trust should look for payment solely to its property. Under these circumstances there is no reason why we should not give full effect to the agreement of the Bank of Topeka, arising from its acceptance of the note, that it would be bound by the declaration of trust, including the provisions in the articles exempting the shareholders from personal liability for the engagements of the trustee.

There are some other questions of importance in the case, but our conclusions render it unnecessary to consider them.

Demurrer sustained; declaration adjudged insufficient; judgment for defendants, with costs.

INDUSTRIAL LUMBER CO. v. TEXAS PINE LAND ASS'N.

(Court of Civil Appeals of Texas, 1903. 31 Tex. Civ. App. 375, 72 S. W. 875.)

Action by the Industrial Lumber Company against the Texas Pine Land Association. From a judgment for defendant, plaintiff appeals.

GILL, J.[17] This is an appeal from a judgment sustaining demurrers to the plaintiff's amended original petition. * * *

It was averred that plaintiff, the Industrial Lumber Company, a Texas corporation, entered into a written contract with the Texas Pine Land Association, by which the last-named concern leased to plaintiff a certain sawmill at Liberty, Tex., and certain land on which it was situated, for the term of two years from April 1, 1898, and bound itself, among other things, to cut and furnish at the sawmill for a named price a sufficient number of logs to enable the mill to be operated at its full capacity during the full term of the lease; that plaintiff took possession of the mill and operated it during the term, but the defendant association failed to furnish a sufficient number of logs to enable plaintiff to run the mill at its full capacity, whereby much time was lost, to plaintiff's damage, for which judgment is asked. It is further averred that, a short time before the expiration of the lease, plaintiff procured a two-years extension of the contract according to its terms, whereby both plaintiff and defendant association were bound as before. * * *

It is further averred that on the ——— day of ———, 18—, after the expiration of the original lease, the defendant association sold and conveyed to John H. Kirby and to the Kirby Lumber Company and the Houston Oil Company (two Texas corporations) all its holdings in Texas, including the property leased to plaintiff, and all the lands from which the association expected to get logs to be furnished for the operation of the mill; that the vendees ousted plaintiff from its holdings, and the association, by reason of such sale, ceased to be a going

[17] Parts of the opinion are omitted.

concern, and by that act has rendered it impossible for the association to comply with the terms of the lease. Large damages are averred to have resulted from this breach by the association growing out of the failure to furnish logs for the two-years extension of the lease, and for this plaintiff prays damages also. John H. Kirby and the two Texas corporations above named were made parties defendant for the purpose of foreclosing an asserted lien upon all the property conveyed by the association to them, and plaintiff also sought, by injunction, to hold in the hands of Kirby, the Houston Oil Company, and the Kirby Lumber Company all the consideration for the purchase from the association which had not theretofore passed. A lien, as before stated, was asserted against all the property purchased, and was averred to exist by reason of the following facts:

That the Texas Pine Land Association was a voluntary association or joint-stock company, the membership of which is very numerous, and the names of all the members are unknown to plaintiff, and all are alleged to be nonresidents of this state; that the membership is so large it is impracticable, if not impossible, to make each and all of them parties to this suit; that the Texas Pine Land Association was organized for the purpose of and was engaged in the investment of capital in pine and other timber lands in Texas, and in cutting and selling logs, and operating sawmills, trams, and booms, and operating a general lumber and timber business; that the business of the association had been intrusted by its members to Thomas L. Nelson, Francis Peabody, Jr., and Noah W. Jordan (residents of Boston, Mass.), as trustees, who were fully empowered to transact all the business of the association, and to make all necessary contracts, sales, and bargains in furtherance of the purposes of the association. But the power of these trustees was specifically limited by the following stipulation, embodied in the written instrument, denominated "Declaration of Trust," which was the source of their authority: "Art. 13. The trustees shall have no power to bind the shareholders personally, and, in every written contract they shall enter into, reference shall be made to this declaration of trust. And the person or corporation so contracting with the trustees shall look only to the funds and property of the trust for the payment under such contract, or for the payment of any debt or damage, judgment or decree, or of any money that may otherwise become due and payable, by reason of the failure on the part of the trustees to perform such contract in whole or in part, so that neither the trustees nor the shareholders, present or future, in this trust shall be personally liable therefor." In pursuance of this clause there was incorporated in the original lease contract the following clause: "It is further distinctly understood that the party of the first part is a joint-stock association without personal liability of its stockholders, and that for any debt, demand, or damage arising under this instrument against the party of the first part the party of the second part, or other party in whose behalf such demand may arise, shall look exclu-

sively to the trust property in the hands of the trustees of the party of the first part, and upon no account and in no event shall there be any individual liability of the shareholders, party of the first part, or its trustee." * * * It is alleged * * * that the contract of lease itself evinces a purpose on the part of the parties thereto to charge the property with a lien, and that if that does not do so an equitable lien clearly arises in favor of plaintiff by reason of the declaration of trust, the terms of the lease, and the attendant facts averred. It is further alleged that Kirby and the two defendant corporations had actual notice of all the facts and the existence of plaintiff's demands, and that same were secured by a lien at the time of and before the purchase by defendants. A foreclosure of the asserted lien is prayed for against the trust property in the hands of the defendants. * * *

The question which includes all others necessary to be disposed of on this appeal is, did the court err in sustaining the general demurrer to plaintiff's amended original petition? Plaintiff seems to rest his cause of action upon two theories, and asserts a right to recover upon either the one or the other: First. Where a person, or association of persons, contract in lieu of personal liability that the property of such person or association shall stand pledged to the performance of such agreement, and to the payment of any money demand of whatever nature which may result from such contract or grow out of its breach, an equitable lien is thereby created upon the property. Second. Inasmuch as by the very nature of the association, as created by the declaration of trust, there could be no personal liability, and the property of the association could alone be looked to by the creditors of the concern, such property became a trust fund in the hands of the trustees chargeable with a lien in favor of its creditors, and this lien followed it into the hands of purchasers with notice, where by such sale and purchase the association went out of business, and ceased to be a going concern. In order to clearly and correctly determine whether either of these propositions can be maintained, it is necessary, first, to ascertain the nature of the association as a legal entity, and, second, the legal effect of the contract of lease, with its stipulations exempting from liability the individuals at interest as parties of the first part. In disposing of these questions we will pretermit all inquiry as to whether the portions of plaintiff's demands, which are of the nature of unliquidated damages, could in any event be declared to be secured by an equitable lien, and shall dispose of the case as though the suit in all other respects was free from question.

It appears from plaintiff's allegations that the defendant association is a joint-stock company or voluntary unincorporated association, composed of a great number of persons whose interests are evidenced by certificates of stock, and which transacted its business and managed its affairs through named trustees with prescribed powers. Such concerns are uniformly held in the United States to be partnerships, subject to be sued as such, and governed by the laws fixing partner-

ship responsibility. 22 Ency. Law (2d Ed.) p. 637; Cook on Stock and Stockholders, volume 1, § 508; Thompson on Corp. volume 1, § 14, p. 16. They are distinguishable from "partnerships," as that term is ordinarily used, only in the respect that the death or withdrawal of one or more members does not effect a dissolution, and that the stock can be bought and sold without affecting the integrity of the concern. In these respects they partake of the nature of corporations, but these peculiar characteristics do not affect the nature or extent of the individual liability as to third parties. The agreement among members, or between themselves and the trustees appointed to manage the affairs of the concern, that no personal liability should rest upon the members, would not have the purposed effect, any more than such an agreement between the members of an ordinary partnership would accomplish that end. A. & E. Ency. Law, vol. 22, pp. 143–173.

Our statute prescribes how a limited partnership may be constituted, and compliance with its terms, requiring certain evidences of its peculiar nature to be placed of record, puts the world on notice of the nature of its liability. Rev. St. tit. 76. But it does not follow by reason of the existence of this statute that either an ordinary partnership or an association of individuals may not contract with another that, as to liabilities growing out of the particular transaction evidenced by the contract, the partners or the members of the association shall be exempt from personal liability, and that the other contracting party must look alone to the common holdings of the firm or association for indemnity. The statute merely confers a power. It does not limit or destroy any common-law right. We are aware of no rule either of law or public policy, which forbids the making of such a contract. 1 Cook on Stockholders, § 216; 22 A. & E. Ency. Law, p. 173; Lindley on Partnerships, 377, 378, 382. These things being true, it is plain also that such contract does not necessarily create a lien upon the property or any part of it. Lindley on Partnership, p. 380. Whether it does or not depends upon the intention of the parties, as expressed by the language of the instrument itself, or gathered from that and attendant circumstances. If the instrument itself declares the lien, it needs no aid from a court of equity. If the instrument evinces a purpose on the part of the parties that a lien should exist, but falls short of its creation, proceeding upon the maxim that equity considers as done that which ought to be done, the courts will carry out the just purposes of the contracting parties. 11 Ency. of Law (2d Ed.) p. 123. But it must appear that a lien was intended or promised upon some specific property. 3 Pom. Eq. § 1235.

With these rules and principles in mind, an inspection of the contract of lease convinces us that a lien was neither created nor promised. If read in the light of the declaration of trust, to which it refers, and especially in view of the surrounding facts at the date of its creation as disclosed by the petition, the correctness of this construction becomes very plain.

The association is averred to have owned vast quantities of land, and to have been engaged in the cutting and selling of timber and lumber, and in the operation of trams, booms, and sawmills situated in various counties in the state. To hold that such a contract, in the absence of specific language to that effect, created a lien on all the property of the concern in Texas, would lead to the absurd conclusion that the logs, being cut and sold, were subject thereto; that other mills and land, leased by other parties under the general purposes of the concern, were also covered, and if subsequent in date would be subject to such lien. We do not mean to say that a contract involving such consequences might not have been made, but are of opinion that these facts go far to show that no such purpose was in the minds of the parties here. It is well to remember in this connection that the trustees were not empowered to make any other sort of contract than one exempting the members from liability, and that of this restriction plaintiff was aware, and hence must have known that all other contracts made by the concern in Texas must have been couched in like terms.

Does the fact that the members of the association were exempted from individual liability, and that plaintiff was bound by the contract to look to property held in common by the members of the concern, of itself authorize a court of equity to imply a lien upon the common property? If the contract of lease had pointed out specific property to which the lessee should look, there might be much force in appellant's position on this point. But the case before us presents a different aspect. No property was described except the property leased, and that simply for the purposes of the lease feature of the contract. The property of the association was vast in amount, scattered over many counties, and consisted of realty and personalty. It may be inferred from the petition, if not in fact alleged, that much of the property was then involved in like contracts with others, and much of the personalty exposed to daily sale.

We do not think the facts alleged authorize the conclusion either that a lien was intended by the parties or that equity should imply one from the facts. We have said the contract was not one forbidden by law, and this means of course that thereunder plaintiff must be accorded some effective remedy. In holding that no lien existed, plaintiff's rights are not precluded. It seems to us the most natural and reasonable construction to place upon the contract would be to hold that the exemption from personal liability simply gave direction to any execution which might be issued on any judgment procured by plaintiff against the concern, its members or representatives. Thus, if plaintiff had procured judgment against the association, and it had pleaded in defense the restrictive clause of the contract, the judgment should have directed the execution to be levied only upon firm property, and if it should be made to appear that the other defendants had purchased the property of the association, with knowledge of a purpose on its part to defraud its creditors, such property, under well-

settled rules of law, could nevertheless be subjected to the debt. It is perhaps true, also, that plaintiff has a remedy against the trustees personally for misappropriating the funds of the association. Lindley on Partnership, p. 383. If, however, we are in error in holding that the contract of personal exemption was valid, then plaintiff had the right, under appropriate pleading, to a personal judgment against each member of the association, or such members as he could identify and serve with process, with right to general execution against them, and execution against the firm property as to all. So that, in any event, the demurrer was properly sustained, unless plaintiff's proposition is sound, to the effect that parties purchasing all the assets of such a concern are responsible for its liabilities, and that a lien exists upon such assets to secure such claims. The funds and property of a defunct corporation are a trust fund in the hands of the directors for the benefit of the stockholders and creditors. It is also true that when one corporation buys out the property of another corporation, whereby the first concern becomes defunct, the purchaser becomes responsible for the debts of the defunct concern at least to the value of the property purchased; but we are of opinion this rule as to corporations cannot be applied to the association in question, which, as to third parties, is in all essential respects a mere partnership.

Upon the proposition that, irrespective of whether the contract itself sufficed to create a lien or would authorize a court of equity to declare one, the nature of the association and the nature of plaintiff's contractual relation did nevertheless create one, plaintiff relies on the case of Society of Shakers v. Watson, 15 C. C. A. 632, 68 Fed. 730. In that case the appellant was composed of a membership of 100, consisting of minors as well as adults, its membership constantly shifting and changing. None of the members individually owned any interest in the property of the society, nor were the interests represented by shares. It was neither a corporation nor joint-stock company, was not engaged in business for profit, and the common holdings were intrusted to and managed by trustees. These latter borrowed money which went to the betterment of the society's holdings. The court held it was not a partnership, that there could be no individual liability, and that from all the facts it was manifest the parties intended the claim should constitute a lien against the property of the society. Even if we should regard the case as binding authority, it is nevertheless clearly distinguishable from this in the respects above mentioned, and the court was doubtless correct in holding that, under the peculiar facts of that case, a lien existed. Such an association is neither a corporation nor a partnership. 22 A. & E. Ency. of Law, p. 53. So in Bank v. Eaton (C. C.) 100 Fed. 8, on which the plaintiff also relies. The case is much like the one at bar, but with this distinction: the articles of trust specifically declare that the money borrowed, and for which the suit was brought, should constitute a lien upon the trust property

then existing and thereafter to be acquired. The case cited contained a fact element which is lacking in the one before us.

We do not deem it necessary to discuss the other cases cited by appellant. We do not regard them decisive of the question determined here. That partnership creditors have no lien upon partnership assets is well settled, and the mere fact that the partners have seen fit to contract against personal liability does not vary the rule.

The judgment is affirmed.

McCARTHY v. PARKER et al.

(Supreme Judicial Court of Massachusetts, 1923. 243 Mass. 465, 138 N. E. 8.)

Action by Francis V. McCarthy against Thomas B. Parker and others for legal services rendered persons doing business under a declaration of trust. Reported from the superior court after a jury finding for plaintiff and a directed verdict for defendants, in accordance with leave reserved.

PIERCE, J. This is an action of contract, brought by an attorney at law to recover on a quantum meruit with an account annexed the value of legal services, alleged to have been rendered the defendants, as copartners doing business under a declaration of trust as the Lynn Glass Manufacturing Company. The defendants answered general denial and payment; also that the declaration of trust created a trust and not a partnership; that the plaintiff's services were rendered with knowledge that the Lynn Glass Manufacturing Company was not a partnership, but was a trust operating under a declaration of trust. The case was tried to a jury upon an auditor's report, some oral and written evidence, and the declaration of trust; the jury found for the plaintiff.

The judge, with the assent of the jury, under G. L. c. 231, § 120, in accordance with the leave reserved, directed a verdict for all the defendants; the plaintiff failed to file his exceptions to said direction, and the same were dismissed. The judge then reported the case to this court upon the following terms: "If in law the verdict of the jury was warranted on the evidence, and the action of the judge in entering a verdict for said defendants was erroneous, judgment is to be entered on the verdict of the jury; otherwise, judgment is to be entered on the verdict entered by the court."

Without decision we assume the shareholders in the voluntary association operating under the declaration of trust set out in full in the report were partners as to all creditors, who did not expressly or impliedly contract only to look to the funds or property of the association for the payment of any debt, damage, or decree which might become due or payable to them. Williams v. Milton, 215 Mass. 1, 102

N. E. 355; Frost v. Thompson, 219 Mass. 360, 106 N. E. 1009; Hussey v. Arnold, 185 Mass. 202, 70 N. E. 87; Rand v. Farquhar, 226 Mass. 91, 115 N. E. 286.

The plaintiff on July 23, 1918, was retained to act for the association, as an attorney at law, by the general manager and treasurer with the knowledge and assent of the trustees in whom the power to employ counsel was placed by the declaration of trust. He acted in this capacity for a period of nearly a year,—about half his time being taken up with such work. He was consulted with the utmost frequency and often at great length by the president, treasurer, and general manager, all of whom were trustees or became such shortly after his first employment. Some of the shareholders, though not all, became acquainted with the employment of the defendant, and made no objections. He received some payments through the treasurer. He made no demand on the shareholders individually and gave them no intimation that he held them liable for his services, until August, 1919. When this action was brought, a mortgage covering the property of the company had been foreclosed and the company was without assets. It was not until after this situation had arisen that the plaintiff decided to sue the shareholders.

From the beginning of his employment the plaintiff knew the contents of the declaration of trust and knew therefrom that the defendants intended not to be partners and believed that they were not personally liable for the acts of the trustees in conducting the business of the association under the terms of the trust agreement. Danforth v. Allen, 8 Metc. 334. The plaintiff had knowledge that the declaration of trust provided that "the trustees shall have no power to bind the shareholders personally, and all persons, associations or corporations extending credit to, contracting with, or having any claim against the trustees shall look only to the funds or property of the association for payment of any debt, damage, judgment or decree, or any money that may otherwise become due or payable to them from the trustees, so that neither the trustees nor the shareholders present or future shall be personally liable under or by reason of such order, contract or obligation."

There is nothing contrary to the law as hereinbefore declared or to public policy which inhibits an agreement that a creditor in case of default in payment shall look exclusively to a fund for his reimbursement. Hussey v. Arnold, supra. And there is no decision cited by the plaintiff or found by us that prohibits the doing of business through an agent with a limitation upon the individual liability of the principal, if the person who deals with such an agent does so with knowledge of the limited authority of that agent. Williams v. Milton, 215 Mass. 1, 6, 102 N. E. 355. We perceive no reason why the rule that one who deals with an agent with knowledge of his limited powers does so at his peril is not applicable to dealings with the agent of a copartnership, when the agent is also a partner. Uniform Laws

Relative to Partnership (St. 1922, c. 486) § 9; Mussey v. Beecher, 3 Cush. 511; Vickery v. Richardson, 189 Mass. 53, 55, 75 N. E. 136.

It follows that, in the terms of the report, judgment is to be entered on the verdict entered by the court. So ordered.

BARNETT et al. v. CISCO BANKING CO. et al.

(Court of Civil Appeals of Texas, 1923. 253 S. W. 339.)

Action by the Cisco Banking Company against E. R. Wolcott and others, in which defendants, by special answer, set up liability of J. W. Barnett and others, who answered as defendants. From judgment for plaintiff, the last-named defendants appeal.

HIGGINS, J. The Cisco Banking Company brought this suit upon a promissory note of the Imperial Oil & Development Company, an association operating under a declaration of trust, executed by its trustees E. R. Wolcott, S. A. Sauls and James L. Shepherd, in the name of the company; said note being also signed by Wolcott, Sauls, and Shepherd in their personal capacities as sureties. The note was to the order of plaintiff and dated September 6, 1920.

The suit was brought against said makers to recover upon the note and for foreclosure of liens securing the same. J. J. Albin, W. E. Putman, and H. W. McGee were joined as parties defendant, under the allegation that they were claiming some interest in the property upon which foreclosure was sought.

The note sued upon was given in renewal of a note of the association. When the original note matured, the bank declined to renew the same except upon the condition that Wolcott, Sauls, and Shepherd assume personal liability upon the renewal note, which they did by signing in their personal capacity as sureties.

Wolcott, Sauls, and Shepherd (hereinafter designated appellees) by special answer set up that the Imperial Oil & Development Company was a joint stock company, doing business under a pretended declaration of trust, with sole powers in the trustees, but in fact the same was a partnership and liable as such; that J. W. Barnett and many others, naming them (hereinafter designated appellants) were the partners and as such primarily liable upon the note sued upon, and appellees sureties thereon and secondarily liable only, and that since December 20, 1920, Shepherd had ceased to be a trustee or stockholder in the company and had no interest therein, wherefore they prayed that said partners be made defendants, and that the company and said partners be held primarily liable and appellees secondarily liable, and judgment be rendered and execution issued accordingly. A plea in abatement in due order was also filed by appellees suggesting a defect of necessary parties defendants, namely, the appellants. This plea was based upon the matters set up in the special answer of

appellees, but seems not to have been insisted upon, as the records disclose no action thereon.

Appellants answered, setting up the declaration of trust and attaching a copy thereof to their answer and making it a part thereof and claiming exemption from liability under the terms of the instrument.

Upon trial without a jury, judgment was rendered dismissing as to McGee for want of service; in favor of C. D. Payton and L. C. Payton, who were among the parties vouched in by appellees; in favor of the bank for the amount due upon the note; and with foreclosure of lien against the Imperial Oil & Development Company, Wolcott, Sauls, Shepherd, and the appellants, as principals, and also against Wolcott, Sauls, and Shepherd as sureties. Judgment of foreclosure was also rendered against Albin and Putman. For any deficiency after the sale execution was directed to be levied first upon the property of the Imperial Oil & Development Company; second, the property of the partners; third, upon the property of the sureties Wolcott, Sauls, and Shepherd.

The material facts controlling the rights of the parties are undisputed and are as follows: The trust agreement is dated December 23, 1918, and was executed by a number of persons, among them, Wolcott, Sauls, and W. C. Houston, who were made the first trustees. Shepherd subsequently succeeded Houston as trustee. Sections 1 and 2, art. X, of the declaration of trust reads as follows:

(1) "The trustees shall have no power to bind the shareholders personally, and the subscribers and their assigns and all persons and corporations extend to, contracted with, or having any claim against the trustees, shall look only to the funds and property of the trust for payment under such contract or claim, or for the payment of any debt, damage, judgment, or any money that may otherwise become due or payable to them from the trustees, so that neither the trustees, nor shareholders, present, or future, shall be personally liable by reason of such order, contract, or obligation."

(2) "In every written instrument, order, or obligation which the trustees shall give or enter into, it shall be the duty of the trustees, to stipulate that neither the trustees nor the shareholders shall be held personally liable by reason of such order, contract, or obligation."

Wolcott, Sauls, and Shepherd were stockholders in and trustees of the company when the note sued upon was made. Appellants were stockholders when the note was executed.

In support of the judgment, appellees assert that the trust agreement was ineffective to create a so-called Massachusetts or common-law trust because the instrument does not make the trustees the absolute masters of the trust estate; the stockholders therefore are liable as partners and the stipulation in the trust agreement relieving them from personal liability upon the obligations of the company is contrary to law and public policy and consequently void.

So far as concerns the rights of third persons dealing with the com-

pany it may be assumed that this position is correct but no such question is presented. The Cisco Bank sought no relief in the court below against these appellants and has filed no brief in this court in support of the judgment rendered.

The parties seeking to impose a personal liability upon these appellants, and at whose instance the same was imposed, are the trustees.

We know of no rule of law, or principle of public policy, which would preclude partners as between themselves from agreeing that the managing partners would have no power to bind the partners personally, and that every written obligation which the managing partners might enter into should stipulate that the partners should not be personally liable thereon. On the contrary, we are of the opinion that such an agreement as between the partners themselves is valid and binding. Wells v. Tel. Co. (Tex. Civ. App.) 239 S. W. 1001; Hossack v. Ottawa Dev. Co., 244 Ill. 274, 91 N. E. 439.

This is based upon the rule that, in general, partners as between themselves may make such lawful stipulations as they see fit. Contracts of this nature may be ineffective so far as concerns the rights of third persons, but are none the less binding upon the parties themselves. Parsons on Part. 232.

The trust agreement constitutes the articles of partnership and makes the trustees the managing partners. If in fact the note sued upon imposed in favor of the plaintiff a personal liability against the appellants, then such liability was imposed by the trustees contrary to the partnership agreement and regardless of the duty imposed upon them to stipulate in every written obligation entered into that no personal liability should attach to the stockholders. The action of the trustees in this matter breached the partnership stipulations. It was misconduct which would subject them to personal liability for any loss which the other partners might sustain thereby. 30 Cyc. 453.

Since the plaintiff in this case is asking no relief against these appellants, the trustees, for their own benefit and protection, cannot invoke the rules of law upon which they seek to sustain this judgment, and the judgment rendered against these appellants is unwarranted.

It is contended that appellants' pleadings are insufficient. It is a sufficient reply to this to say that a copy of the trust agreement was attached to and made a part of the answer. The facts are fully pleaded, and that is all that is necessary. It was not necessary that an estoppel in pais be pleaded. The charter of appellants' rights against the trustees is the trust agreement. That is the contract which, as between the appellants and the trustees, protects the former from the consequences resulting from the latter's breach of its provisions.

The judgment of the court below will be reversed, and judgment here rendered in favor of appellants. In all other respects the judgment of the court below will remain undisturbed.

Costs of appeal are taxed against Wolcott, Sauls, and Shepherd.

Reversed and rendered, as indicated.

HAYES MOTOR TRUCK WHEEL CO. v. WOLFF et al.

(Supreme Court of Wisconsin, 1921. 175 Wis. 501, 185 N. W. 512.)

Action by the Hayes Motor Truck Wheel Company against Herman Wolff and others, copartners doing business as the Ton-A-Ford Truck Company. From a judgment for defendants, plaintiff appeals.

Action to recover the purchase price of a certain number of truck wheels sold to the defendants, who it is alleged were doing business as copartners under the name of the Ton-A-Ford Truck Company. The answers denied that defendants were copartners, and alleged they were operating under a certain trust agreement, duly recorded in the office of the register of deeds of Racine county, under which agreement they were relieved from personal liability. The trial court found that defendants were copartners, that they were not operating under the trust agreement, that plaintiff had no notice of the same, and that all the appealing defendants were holders of certificates of stock in the company at the time the indebtedness was incurred. * * *

VINJE, J.[18] The trial court correctly concluded that the defendants were copartners, so far as the plaintiff's claim was concerned, for, conceding the validity of the trust agreement, they never held themselves out as doing business thereunder. It is therefore not necessary to set out the terms thereof, nor to pass upon its validity. The clause quoted from their letter would indicate that the Ton-A-Ford Company was a corporation, for in Carpenter v. McCord Lumber Co., 107 Wis. 611, 83 N. W. 764, it was held that a defendant, sued as the McCord Lumber Company, was intended to be sued as a corporation, sufficiently appeared from its name. Here we not only have a corporate name, but the letter speaks of the officers and shareholders of the company. But defendants were not incorporated, and, since they did not hold themselves out as operating under a trust agreement, they were as to plaintiff copartners, individually liable for the debts of the concern contracted while they were partners thereof. Bartelt v. Smith, 145 Wis. 31, 129 N. W. 782, Ann. Cas. 1912A, 1195. * * *

CREHAN v. MEGARGEL et al.

(Court of Appeals of New York, 1922. 234 N. Y. 67, 136 N. E. 296.)

Action by Mark H. Crehan against Ralph C. Megargel and others. From a judgment of the Appellate Division (199 App. Div. 649, 192 N. Y. Supp. 290), reversing an order of the Special Term, and sustaining demurrers to the complaint, plaintiff appeals.

HISCOCK, C. J.[19] This action is brought against defendants as al-

[18] Part of the statement of facts and part of the opinion are omitted.
[19] Parts of the opinion are omitted.

leged members of the firm of Megargel & Co. to recover upwards of $500,000 damages for breach of contract made by said copartnership in the state of Massachusetts to carry out certain stock transactions for plaintiff. The complaint sets forth four separate causes of action, each one dealing in different form with the same transactions and alleged defaults, and each is demurred to by every defendant on various grounds, including the one that it does not state facts sufficient to establish any liability. The latter ground of demurrer is the only one which we deem it necessary to consider and in this connection we shall not review in detail all of the allegations of the complaint, for their sufficiency as setting forth a cause of action against the defendants of the character indicated is so clear, except at two points, that it is unnecessary to do this. We shall confine ourselves to outlining those allegations which present the interesting points in the case which require discussion, and it will be assumed that the complaint in other respects is sufficient under its allegations to set forth a cause of action. * * *

The other two counts * * * attempt to set forth a cause of action against the defendants on the theory that, through failure to comply with the statutes of this state governing the organization of limited partnerships, they have become liable as general partners in the copartnership of Megargel & Co. These allegations are to the effect that the attempt was made in this state to organize said limited copartnership with the defendant Ralph Megargel as a special partner; that the other defendants really furnished the capital which he nominally contributed as such special partner; that the certificate and affidavit made and filed as required in the case of the organization of a limited partnership were not sufficient or truthful; and that, therefore, said other defendants became subject to the penalty imposed by section 34 of the Partnership Law (Consol. Laws, c. 39) which provides that, "if any false statement be made in any such certificate or affidavit, made either upon the formation or renewal or continuance * * * of such partnership * * * the persons interested therein shall all be liable as general partners."

The controlling question here is the one whether defendants were "persons interested," and thus became liable as members of the copartnership in the manner claimed, and we shall consider first the two counts presenting this question.

The arrangement under which the other defendants furnished to Megargel the money which he contributed to the limited partnership was set forth in a written agreement, and while the complaint contains certain allegations to the effect that said arrangement was invalid and an unlawful and ineffectual device to evade the law regulating the formation of limited partnerships, and that these defendants and not Megargel contributed the capital and became interested in the copartnership, these allegations as made are the statements of mere legal conclusions, and the sufficiency of plaintiff's complaint is to be tested by

the agreement itself, which is not effectively contradicted, altered, or condemned, if otherwise valid, by any of said allegations. We therefore turn to it for the purpose of determining whether under it defendants, other than Megargel, became "persons interested" in the partnership, so as to become liable as general partners, when there was failure to comply with the statute governing the organization of limited partnerships.

The agreement is too long to be quoted, or even to be summarized, except in the briefest manner possible, having in view the controlling features. It provided for the payment by the other parties, who included these defendants, of certain sums of money to Megargel under a trust by which he was to contribute said moneys as his capital in a special partnership to be organized. First, as between him and the other members of said proposed partnership said moneys, when received, were to be contributed "in his own name and as his sole and individual special capital" to the partnership. He and the moneys so contributed were in all respects to be subject to the provisions of the partnership agreement, which was annexed to the trust agreement, and to all laws governing such a partnership, and the subscribers (these defendants) were to "have no right of accounting or other rights whatsoever against the said partnership, * * *" but were "in all respects [to] be strangers thereto," and "as regards the trust property and estate or any of the rights and interests guaranteed" they should "look only to the party of the second part [Megargel] or his representatives," except that, in the event a dissolution of the partnership should be caused by the death of Megargel and the consequent termination of the trust created, the subscribers were entitled to receive from the survivors of the partnership the amount of special capital that might remain after final liquidation of the business thereof. Second, as between Megargel and the subscribers (defendants) the relation of trustee and cestui que trust was created. Megargel, on payment to him of the respective amounts subscribed, was to issue receipts to the several subscribers, of which receipts a registry and record were to be kept. "Upon the receipt by him of any interest or profits to which he might [may] be entitled as special partner as aforesaid," the same forthwith were to be distributed through the agency of a trust company amongst the registered holders of said receipts. Various provisions were made for protecting and safeguarding the relations between Megargel and the subscribers, but all of these were based upon a relationship of the copartnership solely with Megargel as special partner, and none of them in any manner qualified that exclusive relationship, or brought the subscribers into the slightest relationship with the copartnership, or the members thereof other than Megargel, or gave them any voice in or supervision over the affairs of said copartnership.

It was primarily provided that this relation and condition between Megargel and the subscribers were to continue for five years, but the further provision was made between the subscribers that, if it should

be terminated by the death of Megargel within that time, on the consent of the surviving members of the partnership and the agreement of not less than 51 per centum in amount of the subscribers, a new limited or special partnership might be formed with a new special partner.

For the purpose of establishing that under this agreement the subscribers became "interested" in the partnership, plaintiff seeks to bring to his aid two different theories of this agreement—one that it is a valid instrument as between the parties, to be construed as it is written; the other, that it is invalid as providing for an undue suspension of the ownership of the property thereby covered.

Pursuing the first theory, the basis of plaintiff's claim is the provision in the Partnership Law relating to limited partnerships already referred to, and which provides that if any false statement be made in the certificate or affidavit essential to the formation of such a partnership, "the persons interested therein shall all be liable as general partners." Then planting himself upon this provision he says: "The essential claim * * * in this case is that these defendants are the ones who actually contributed the special capital to the partnership of Megargel & Co.," and each of said defendants "had a legal interest in said alleged limited partnership as a special partner therein at the time of its attempted formation."

Thus the fundamental question becomes one of interpretation of the words "persons interested," in the statute just quoted, as a means of reaching the decision whether these defendants were such persons interested, and who therefore became liable as general partners, because of false certificates and false affidavits as alleged in the complaint.

In the consideration of defendants' liability, counsel have discussed the somewhat general question whether the words "persons interested" in the statute should ever be interpreted to mean any one other than he who would be a general partner unless he secured a limited liability under the statutes by compliance with the terms thereof. Under the claims advanced by plaintiff, we think that the controversy before us may be decided by the determination of what is perhaps a more concrete question. If the defendants other than Megargel did not contribute capital to the limited partnership in the sense claimed by plaintiff, then we fail to see how on any theory they were "persons interested" within a reasonable interpretation of the statute. We do not think that they did contribute special capital to the partnership in any such manner or with any such result as is claimed.

Clearly they did not contribute capital in the manner, under the conditions and with the results contemplated by the statute as necessary to establish the status of a special partner. The statute provides that one who desires to enter a copartnership as a special partner shall not only contribute in his own name a specific sum as capital, but that he shall establish his status and relationship with the other individuals who are to be copartners by entering into an agreement with them, which is to

be filed, recorded, and published, and in which, amongst other things, is to be stated the names of all the partners, including the special partner and the amount of capital which such special partner has contributed; that the name of the special partner shall be posted, and that he shall have certain rights to examine into the state and progress of the partnership business and advise as to its management, and to receive interest and profits on his investment. These defendants come within none of these provisions. As between them and the other members of the copartnership they made no contribution of capital, signed no partnership agreement, and established no relationship with the copartnership, but were expressly debarred therefrom, and secured no benefit from such copartnership, except as it might come in an indirect way through accountability of the special partner for the profits which he had received from the copartnership. On the face of the written agreement they were wholly disconnected from the partnership and utter strangers to its members, its affairs, and its capital, save in the one instance that, in case of the death of their trustee and the dissolution of the firm, they were entitled to receive from the firm the residue, if any, of the moneys to which their trustee would have been entitled, if living. But this was the arrangement which equity would have enforced without any specific agreement and did not change the effect of their agreement.

Neither did they in our opinion contribute capital in a manner which, while not such as contemplated by the words of the statute, nevertheless came within its spirit and purpose. Of course, we do not intend to negative the proposition made by the plaintiff that an arrangement might be made by one who was not named as special partner which would be so designed to evade the statute and give him the rights of that status that he would be held liable under the penalties of the law. Such was the basis of the decision in Buckley v. Lord, 24 How. Prac. 455, greatly relied on by the plaintiff. The court held in that case that the person sought to be charged with a general liability had attempted to evade the law by what was characterized a "flimsy contrivance to evade the statute," and, whether this interpretation of the facts was correct or not, that was the theory on which the defendant was held.

No such situation is presented to us by the present complaint. While, as we have stated, there are various allegations of liability upon the part of the defendants under the statute, these are conclusions based upon an interpretation of a written instrument, and that instrument, read as it is written, establishes between the subscribers and the partnership no contribution of capital, no relation of partners, and no contact with or supervision over partnership affairs. The trust is an insurmountable barrier raised between them and the partnership and separating them from an interest in its affairs, and it seems to us to be a valid arrangement, and to come within the principles which have been approved both by eminent text-writers and the decisions of vari-

ous jurisdictions in the case of so-called commercial or business trusts as substitutes for business corporations. Burdick on Partnerships (3d Ed.) p. 43 et seq.; Thompson on Business Trusts, etc., p. 28; Rhode Island Hospital Trust Co. v. Copeland, 39 R. I. 193, 98 Atl. 273; Williams v. Milton, 215 Mass. 1, 102 N. E. 355; Home Lumber Co. v. Hopkins, 107 Kan. 153, 190 Pac. 601.

Nor, if that could be potential to change our outlook, are we able to perceive that this view results in any defeat of a public policy as evinced in the statute relating to limited partnerships. The object of that statute and its predecessors in enactment was to provide for a combination of capital and skill, and to enable those who had the former to contribute it to a partnership without other liability than loss of their investment, so long as they complied with the statute and refrained from exercising the powers and privileges of general partners. The interest of a creditor like the plaintiff is that the special capital shall be honestly and fully contributed as provided by the statute, and he has no legal or direct interest in the identity of the special partner, so long as he contributes his capital and observes all of the requirements of the statute. White v. Eiseman, 134 N. Y. 101, 31 N. E. 276; Webster v. Lanum, 137 Fed. 376, 70 C. C. A. 56. We fail to see how he is interested in the fact that the special partner has borrowed the capital which he contributes, or has received it under some other form of arrangement even less compelling upon him than a loan, so long as the arrangement does not result in a violation or evasion of the statute and of the requirement that the special capital shall be contributed and that the special partner shall not assume the status of a general partner. * * *

Thus we are led to the conclusion that in the statement of the two causes of action which we have been discussing the complaint does not state facts sufficient to show any liability upon the part of any of the respondents, except the respondent Megargel. * * *

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APPENDIX

UNIFORM PARTNERSHIP ACT [1]

EXPLANATORY NOTE

The subject of a uniform law on partnership was taken up by the Conference of Commissioners on Uniform State Laws in 1902, and the Committee on Commercial Law was instructed to employ an expert and prepare a draft to be submitted to the next annual Conference. (See Am. Bar Ass'n Report for 1902, p. 477.) At the meeting in 1903 the committee reported that it had secured the services of James Barr Ames, Dean of the Law School of Harvard University, as expert to draft the act. (See Am. Bar Ass'n Report for 1903, p. 501.)

In 1905 the Committee on Commercial Law reported progress on this subject, and a resolution was passed by the Conference, directing that a draft be prepared upon the mercantile theory. (See Am. Bar Ass'n Reports, 1905, pp. 731–738.) And in 1909 the committee reported that it had in its hands a draft of an act on this subject which draft was recommitted to the committee for revision and amendment, with directions to report to the next Conference for discussion and action. (See Report, C. U. S. L. 1906, p. 40.)

In 1907 the matter was brought before the Conference and postponed until the 1908 meeting. (See Report, C. U. S. L. 1907, p. 93.) In 1908 the matter was discussed by the Conference. (See Am. Bar Ass'n Reports, 1908, pp. 983, 1048.) And in 1909 the Second Tentative Draft of the Partnership Act was introduced and discussed. (See page 1081 of Am. Bar Ass'n Reports for 1909.)

In 1910 the Committee reported that on account of the death of Dean Ames no progress had been made; but that Dr. Wm. Draper Lewis, then Dean and now Professor of Law at the Law School of the University of Pennsylvania, and Mr. James B. Lichtenberger, of the Philadelphia Bar, had prepared a draft of a partnership act on the so-called entity idea, with the aid of the various drafts and notes of Dean Ames, and that they had also submitted a draft of a proposed uniform act, embodying the theory that a partnership is an aggregate of individuals associated in business, which is that at present accepted in nearly all the states of the Union. (See Report, C. U. S. L. 1910,

[1] The notes to the Uniform Partnership Act are reprinted here through the courtesy of its draftsman, William Draper Lewis.

p. 142.) Dean Lewis expressed his belief that with certain modifications the aggregate or common law theory should be adopted. A resolution was passed by the Conference that any action that might have theretofore been adopted by it, tending to limit the Committee on Commercial Law in its consideration of the partnership law to what is known as the entity theory, be rescinded and that the committee be allowed and directed to consider the subject of partnership at large as though no such resolution had been adopted by the Conference. (See page 52.)

In the fall of 1910 the committee invited to a Conference, held in Philadelphia, all the teachers of, and writers on, partnerships, besides several other lawyers known to have made a special study of the subject. There was a large attendance. For two days the members of the committee and their guests discussed the theory on which the proposed act should be drawn. At the conclusion of the discussion the experts present recommended that the act be drawn on the aggregate or common law theory, with the modification that the partners be treated as owners of partnership property holding by a special tenancy which should be called tenancy in partnership. (See section 25 of the act recommended.) Accordingly, at the meeting of the Conference in the summer of 1911, the committee reported that, after hearing the discussion of experts, it had voted that Dean Lewis be requested to prepare a draft of a partnership act on the so-called common law theory. (See Report, C. U. S. L. 1911, p. 149.)

The committee reported another draft of the act to the Conference at its session in 1912, drawn on the aggregate or common law theory, with the modification referred to. At this session the Conference spent several days in the discussion of the act, again referring it to the Committee on Commercial Law for their further consideration. (See Report, C. U. S. L. 1912, p. 67.)

The Committee on Commercial Law held a meeting in New York on March 29, 1913, and took up the draft of the act referred back to it by the Conference, and after careful consideration of the amendments suggested by the Conference, prepared their seventh draft, which was, at their annual session in the summer of 1913, submitted to the Conference. The Conference again spent several days in discussing the act and again referred it to the Committee on Commercial Law, this time mainly for perfection in form.

The Committee on Commercial Law assembled in the City of New York, September 21, 1914, and had before them a new draft of the act, which had been carefully prepared by Dr. Wm. Draper Lewis with valuable suggestions submitted by Charles E. Shepard, Esq., one of the commissioners from the State of Washington, and others interested in the subject. The committee reported the Eighth Draft to the Conference which, on October 14, 1914, passed a resolution recommending the act for adoption to the legislatures of all the states.

Uniformity of the law of partnerships is constantly becoming more

important, as the number of firms which not only carry on business in more than one state, but have among the members residents of different states, increases.

It is, however, proper here to emphasize the fact that there are other reasons, in addition to the advantages which will result from uniformity, for the adoption of the act now issued by the Commissioners. There is probably no other subject connected with our business law in which a greater number of instances can be found where, in matters of almost daily occurrence, the law is uncertain. This uncertainty is due, not only to conflict between the decisions of different states, but more to the general lack of consistency in legal theory. In several of the sections, but especially in those which relate to the rights of the partner and his separate creditors in partnership property, and to the rights of firm creditors where the personnel of the partnership has been changed without liquidation of partnership affairs, there exists an almost hopeless confusion of theory and practice, making the actual administration of the law difficult and often inequitable.

Another difficulty of the present partnership law is the scarcity of authority on matters of considerable importance in the daily conduct and in the winding up of partnership affairs. In any one state it is often impossible to find an authority on a matter of comparatively frequent occurrence, while not infrequently an exhaustive research of the reports of the decisions of all the states and the federal courts fails to reveal a single authority throwing light on the question. The existence of a statute stating in detail the rights of the partners inter se during the carrying on of the partnership business, and on the winding up of partnership affairs, will be a real practical advantage of moment to the business world.

The notes which are printed in connection with this edition of the Act were prepared by Dr. Wm. Draper Lewis, the draftsman. They are designed to point out the few changes in the law which the adoption of the act will effect, and the many confusions and uncertainties which it will end.

WALTER GEORGE SMITH,
Chairman, Committee on Commercial Law.

LIST OF PRINCIPAL ARTICLES IN LEGAL PERIODICALS DISCUSSING THE UNIFORM PARTNERSHIP ACT

Lewis, W. D. Desirability of Expressing the Law of Partnership in Statutory Form. Univ. of Pa. L. Rev. 60:93. (1911)

An Act to Make Uniform the Laws of Partnership. 1 A. B. A. Jour. 398. (1915)

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The Uniform Partnership Act. Cent. L. J. 80:435. (1915)

Lewis, W. D. The Uniform Partnership Act. Yale L. J. 24:617 (1915)

Crane, J. A. The Uniform Partnership Act.—A Criticism. Har. L. Rev. 28:762. (1915)

Lewis, W. D. The Uniform Partnership Act.—A Reply to Mr. Crane's Criticism. Harv. L. Rev. 29:158 and 291. (1915)

Lichtenberger, J. B. The Uniform Partnership Act. Univ. of Pa. L. Rev. 63:639. (1915)
Smith, W. G. The Uniform Partnership Act. Cent. L. J. 80:435. (1915)
Williston, S. The Uniform Partnership Act, with Some Remarks on Other Uniform Commercial Laws. Univ. of Pa. L. Rev 63:196. (1915)
Crane, J. A. The Uniform Partnership Act and Legal Persons. H. L. Rev. 29:838. (1916)
Lewis, W. D. Uniform Limited Partnership Act. Univ. of Pa. L. Rev. 65:715. (1917)
The Uniform Limited Partnership Act. Text. A. B. A. Jour. 3:529. (1917)
Crane, J. A. Conflict of Laws under the Uniform Partnership Act, and Limited Partnership Act. Univ. of Pa. L. Rev. 66:310. (1918)
Uniform Partnership Act. New York's Failure to Adopt it. Col. L. Rev. 18:582. (1918)

PART I—PRELIMINARY PROVISIONS

Section 1. [Name of Act.] This act may be cited as Uniform Partnership Act.

Section 2.[2] [Definition of Terms.] In this act, "court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation, or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any state insolvent act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real property" includes land and any interest or estate in land.

Section 3.[3] [Interpretation of Knowledge and Notice.] (1) A per-

[2] The words "unless the contrary intention appears," found in many different sections, are omitted from this section because, throughout this act, the words defined in this section are not used in any other than the sense in which they are here defined.

[3] The word "notice" in judicial opinions and in other legal writings is often used when "knowledge" as here defined is intended. This has led to a great deal of confusion, of which the extraordinary expression "constructive notice" is evidence. To avoid this confusion the word "notice" as here defined designates definite things only which, if proved to have been done, enable the person doing them to assert that notice has been had and claim the benefit thereof, irrespective of whether the person charged has had knowledge or not. By adhering strictly to this conception throughout the act, the things which a person must do in order to be confident that he can claim the benefit of "notice" are made plain.

A definition of the word "knowledge" enables it to be indicated clearly when "knowledge" as distinguished from "notice" must be had.

The present law in regard to that which must be done by the person who desires to be in a position to claim the benefit of "notice" is in considerable confusion. Under our case law, as a rule, in ordinary transactions, except those which relate to commercial paper, no one has had "notice" until he has "knowledge"; though, of course, "notice" to an agent is notice to a principal. Whether the delivery of a letter containing a "statement of a fact" would or would not be sufficient if the addressee did not read the letter is doubtful. The court might well hold that the addressee, by his neglect to read the statement, was estopped from denying that he had "notice." The change in the law, if it is a change, which the present section as now drawn effects, is, it is submitted, in the right direction. The section does not go to the extent

son has "knowledge" of a fact within the meaning of this act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

(2) A person has "notice" of a fact within the meaning of this act when the person who claims the benefit of the notice

(a) States the fact to such person, or

(b) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

Section 4. [Rules of Construction.] (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.[4]

(2) The law of estoppel shall apply under this act.[5]

of saying that the mere deposit of a "written statement of the fact" in the mail is enough to charge the addressee with "notice." The addressor by selecting the post office, telegraph or other public service corporation, as the method by which the letter shall be transferred, makes them his agents, not the agents of the addressee. On the other hand the section does go to the extent of declaring that if such written statement is received at the residence or place of business of the addressee in the usual way, the addressor, having done all that was reasonably possible to do to give the addressee "knowledge," should have the benefit of his diligence.

The section as drawn, in dealing with the character of the "statement of fact," where the statement is not a verbal statement merely requires a "written statement." The omission of the word "printed" is after deliberation. To insert the word "printed" might raise a doubt as to the effect of the delivery of a newspaper containing a "statement of the fact." There ought to be no doubt that this is an insufficient statement. Unquestionably, such delivery is not a delivery of a "written statement of the fact"; but, on the other hand, if a printed or typewritten statement of the fact—as the dissolution of the partnership—is made on a separate card which is enclosed in an envelope and given to the addressee, there would appear to be no doubt that any court would hold that "a written statement of the fact" had been delivered to such person. The principle is clear. Nothing should be regarded as "a written statement of the fact" which is not so prepared as to cause the one to whom it is addressed, as a reasonably prudent man, to read it. An exact definition of the character of the statement which is to be made is practically impossible; neither do we believe it to be desirable. The words employed, "written statement of the fact," do not preclude the statement from being typewritten or printed but they do emphasize—that which it is necessary to emphasize—that the statement must be a separate statement of the fact made to the addressee, and not a general statement for all the world to read or not as fancy dictates.

The notes to section 4 infra, in regard to "estoppel" and "agency," will perhaps answer some questions which may arise in connection with the present section.

[4] This provision is customary in American Codes. Cal. Civ. Code, § 4; 1 Ala. Code 1907, § 12; 1 Idaho Rev. Codes, § 4.

[5] This paragraph, applying to the whole act, obviates the necessity of constant repetition of the principle. Its necessity is illustrated in the provisions relating to "notice," section 3 (2), supra. A "written statement" may be delivered in such a way as to induce the person to whom it is delivered to abstain from reading it. No one who has thus delivered a written statement should be permitted to claim the benefit of the notice. This result might be attained by inserting after the word "delivers," section 3 (2b), supra, the words "in good faith"; but these words would not provide for the case where the person who has delivered a written notice in good faith, changes his mind, and in bad faith reacquires the writing before it is read.

(3) The law of agency shall apply under this act.[6]

(4) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This act shall not be construed so as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action or proceedings begun or right accrued before this act takes effect.[7]

Section 5. [Rules for Cases Not Provided for in This Act.] In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

PART II—NATURE OF A PARTNERSHIP

Section 6. [Partnership Defined.] (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.[8]

6 This act is a partnership act and not an act relating to agency or any branch thereof. One of the causes of the present confused use of the word notice is due to the attempt to mix two distinct things: What is notice to a person of a fact, and how far notice to an agent is notice to a principal. The second question is wholly a question of the law of agency; the first has nothing to do with the law of agency. The first is dealt with in section 3, supra; the second, is not a question within the scope of a partnership act.

This paragraph also avoids constant reference throughout the act to agents. For instance, in section 9, infra, there is provision that a partner cannot bind the partnership where the person dealing with him has knowledge that the partner with whom he deals has no authority to bind the partnership. The knowledge of an authorized agent of such person should, of course, be effectual. This paragraph in regard to the law of agency avoids any possibility of a different construction, and renders unnecessary the insertion of the words "or authorized agent" after the word "person" in the section referred to and other similar sections.

7 The wording is based on the American Codes. Idaho Rev. Codes 1908, § 4; Cal. Civ. Code, § 4; Rev. St. Colo. 1908, §§ 6296, 6299; Gen. St. Kan. 1905, p. 1633; 1 Burns' Ann. St. Ind. 1908, §§ 240, 241, 1356, 1359; Cobbey's Rev. St. Neb. ——, § 11363; 2 S. D. Comp. Laws 1908, pp. 313, 316, 318.

8 *Explanation of the Reason for the Words Employed in the Definition.*—The first inquiry is, why say a partnership is "an association of two or more persons"? In view of the fact that the word "association" itself implies the acting together of two or more persons, why not merely say that a partnership is an association to carry on business in which the members are co-owners of the business? The word "person" includes, as stated in section 2, supra, "individuals, partnerships, corporations, and other associations." The definition as worded thus asserts what would be doubtful if the words "of two or more persons" were omitted, namely that any one of these associations may become members of a partnership. It is true that if two or more corporations attempt to form a partnership the contract may be ultra vires as to both (Boyd v. American Carbon Black Co., 182 Pa. 206, 37 Atl. 937 [1897]); but the capacity of corporations to contract is a question of corporation law. Under the present law it appears that a partnership can, as such, be a member of another partnership, if that was the intent of the parties. Raymond v. Putnam, 44 N. H. 160 (1862); Cheap v. Cramond, 4 Barn. & Ald. 663 (1821); In re Hamilton (D. C.) 1 Fed. 800 (1880); Riddle v. Whitehill, 135 U. S. 621, 10 Sup. Ct. 924, 34 L. Ed. 283 (1890).

The words "to carry on as co-owners a business" remove any doubt in the

(2) But any association formed under any other statute of this state, or any statute adopted by authority, other than the authority of this state, is not a partnership under this act, unless such association would have been a partnership in this state prior to the adoption of this act; but this act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.[9]

following case: A. and B. sign partnership articles and make their agreed contributions to the common fund. A. refuses to carry on business as agreed. Is there a partnership to be wound up in accordance with the provisions of Part VI, "Dissolution and Winding Up"? The words quoted require an affirmative answer to this question. If the words "carrying on business" had been used, in the case given, no partnership would exist, and Part VI would not apply.

The definition asserts that the associates are "co-owners" of the business. This distinguishes a partnership from an agency—an association of principal and agent. A business is a series of acts directed toward an end. Ownership involves the power of ultimate control. To state that partners are co-owners of a business is to state that they each have the power of ultimate control.

Lastly, the definition asserts that the business is for profit. Partnership is a branch of our commercial law; it has developed in connection with a particular business association, and it is, therefore, essential that the operation of the act should be confined to associations organized for profit.

In view of the many definitions of a partnership which have been proposed, it is desirable to note the reasons for the omission of certain ideas expressed in some of the definitions cited by Lindley in his work on Partnership, pp. 11, 12.

It is not indicated that the association must be a voluntary one. In the domain of private law the term association necessarily involves the idea that the association is voluntary.

To say that the association must be created by contract, is not only unnecessary, but in view of the varied use of the word "contract" in our law, if the word is used an explanation would have to be made as to whether the contract could be implied, and if so, whether it could be implied in law or only implied as a fact. By merely saying that it is an association these difficulties are avoided.

Again, it is not said that the business must be a lawful business. The effect of the unlawfulness of the business is dealt with under Part VI, "Dissolution and Winding Up." Section 31 (3), infra, provides that dissolution is produced "by any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership." If the business is wholly unlawful, then the partnership is dissolved the moment it is created. The omission of the word "lawful" in the definition does not prevent this result. Very often, however, a business may be in part lawful and in part unlawful. Hotel keepers may run a "dive." Placing the word "lawful" before the word business in the definition would tend to throw a doubt on the propriety of the orderly winding up of such a business as a partnership.

See the following cases applying the section: Rosenblum v. Springfield Produce Brokerage Co., 243 Mass. 111, 137 N. E. 357 (1922); Runo v. Rothschild, 219 Mich. 560, 189 N. W. 183 (1922); Columbia Laundry v. Hencken, 203 App. Div. 140, 196 N. Y. Supp. 523 (1922).

[9] The reason for not following the English Act and attempting to enumerate the associations which are excluded because formed under special statutes, is because such an enumeration is unnecessary, and because the paragraph would have to be differently worded for each state. The paragraph as drawn makes any association formed under a statute a partnership if it would have been a partnership in the state if the act had not been adopted. If the association would not have been a partnership had the act not been adopted, the adoption of the act does not make it a partnership. In short, the adoption

Section 7. [Rules for Determining the Existence of a Partnership.] In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section 16 persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise,

(b) As wages of an employee or rent to a landlord,

(c) As an annuity to a widow or representative of a deceased partner,

(d) As interest on a loan, though the amount of payment vary with the profits of the business,

(e) As the consideration for the sale of a good-will of a business or other property by installments or otherwise.

Section 8. [Partnership Property.] (1) All property originally brought into the partnership stock or subsequently acquired by purchase or otherwise, on account of the partnership, is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.[10]

of the act does not change the legal status in the state of any association formed under a statute.

Section applied in Morrison v. Meister, 212 Mich. 516, 180 N. W. 395 (1920).

[10] Paragraphs (3), (4), in connection with section 10, infra, do away with existing confusions where there has been a conveyance to a partnership in the partnership name, or a conveyance by a partner in the partnership name. At present such conveyance may convey an equitable, but does not convey a legal title. To this extent paragraph (3) of this section and section 10 (1), infra, change existing law.

PART III—RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP

Section 9. [Partner Agent of Partnership as to Partnership Business.] (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.[11]

(2) An act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(a) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership,

(b) Dispose of the good-will of the business,

(c) Do any other act which would make it impossible to carry on the ordinary business of a partnership,

(d) Confess a judgment,

(e) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on authority shall bind the partnership to persons having knowledge of the restriction.

Section 10.[12] [Conveyance of Real Property of the Partnership.] (1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 9 or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equi-

[11] The words "including the execution in the partnership name of any instrument" avoid any possible doubt as to whether a partner has the authority, in the ordinary course of business, to enter into formal contracts for his partnership, or to convey partnership property when the conveyance is the result of a sale in the ordinary course of partnership business.

[12] The adoption of this section does away with the existing uncertainty surrounding the subject of the conveyance of real property belonging to a partnership.

table interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(3) Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of section 9, unless the purchaser or his assignee, is a holder for value, without knowledge.

(4). Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

Section 11. [Partnership Bound by Admission of Partner.] An admission or representation made by any partner concerning partnership affairs within the scope of his authority as conferred by this act is evidence against the partnership.[13]

Section 12. [Partnership Charged with Knowledge of or Notice to Partner.] Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.[14]

[13] Admissions before dissolution concerning a particular matter should bind the partnership only where the partner has authority to act in the particular matter; and after dissolution only if necessary to wind up the business. Where the partner has no authority to act and the person with whom he is dealing knows he has no authority, or where the admission is made after dissolution and is not for the winding up of partnership affairs, it should not affect the partnership. If it is not the act of the partnership then it should not be evidence against it. The words "within the scope of his authority as conferred by this act" produce this result.

[14] At present, there is no confusion in the law when the "notice" is given to the partner while he is a partner. In such cases the effect is the same as if notice was had by all the partners. Where the knowledge or notice has been received by the partner before he became a partner, and his partners are ignorant of this, and he is not the partner acting in the particular matter, there is no doubt that there has been neither knowledge of nor notice to the partnership. Where, however, the partner acting in the particular matter, acquired knowledge before he became a partner, and the knowledge is then present in his mind, the weight of authority, and, it is submitted, of reason, appears to be that the partnership should be charged with knowledge. Mechem on Agency,

Section 13. [Partnership Bound by Partner's Wrongful Act.] Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.[15]

Section 14. [Partnership Bound by Partner's Breach of Trust.] The partnership is bound to make good the loss:

(a) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(b) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

Section 15. [Nature of Partner's Liability.] All partners are liable

(a) Jointly and severally for everything chargeable to the partnership under sections 13 and 14.

(b) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.[16]

p. 721. The words "acquired while a partner or then present to his mind" effect the result desired.

It is not clear what the present law is when "knowledge," which is not the knowledge that may come from notice, has been obtained by a partner after the formation of the partnership, but the partner having such "knowledge" is not the one acting in the particular matter. It seems clear that in this case the partnership should be charged only when the partner having "knowledge" had reason to believe that the fact related to a matter which had some possibility of being the subject of partnership business, and then only if he was so situated that he could communicate it to the partner acting in the particular matter before such partner gave binding effect to his act. The words "who reasonably could and should have communicated it to the acting partner" accomplish this result.

15 Treon v. W. A. Shipman & Son, 275 Pa. 246, 119 Atl. 74 (1922).

16 The actual condition of the American statute law affecting the nature of partnership liability is as follows:

In the following states by specific declaration of statutes all partnership liability is made both joint and several: Miss. Code 1906, § 2683; Mo. Ann. St. 1906, §§ 889, 892; 2 Ala. Code 1907, § 2506; N. M. Comp. L. 1897, §§ 2894, 2895, 2942, 2943; Md. Code Pub. Gen. Laws 1904, p. 1357; W. Va. Code 1906, §§ 1976, 3467, 3787; D. C. Code 1901, § 1205; Iowa Code 1897, §§ 3465, 3468; Gen. St. Kan. 1909, § 1641; Minn. Rev. Laws 1905, §§ 4282, 4283; N. C. Revisal 1905, § 413; Ark. Kirby's Dig. 1904, §§ 4420, 4422. In some of these states the liability is merely "deemed to be joint and several for the purposes of suit." In some of the states referred to the statutes are general; that is, they include all joint liability; while in others, there is the general statement followed by specific enumeration of partnership liability. But in all the states referred to the statutes, taken as a whole, effect, not only partnership liability, but also all joint liability.

In Illinois the court refused to interpret a general statute making all

Section 16. [Partner by Estoppel.] (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(a) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(b) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.[17]

liability joint and several so as to include partnership liability (Fleming v. Ross, 225 Ill. 149, 80 N. E. 92, 8 Ann. Cas. 314 [1907]); also the courts of Colorado (Erskine v. Russell, 43 Colo. 453, 96 Pac. 249 [1908]). In New York, though the statute apparently made partners liable jointly and severally (3 Consol. Laws 1909, p. 2522, par. 6), the court refused so to interpret the act. Seligman v. Friedlander, 138 App. Div. 784, 123 N. Y. Supp. 583 (1910).

In Texas, Oklahoma, Montana, Pennsylvania, New York, Colorado, Illinois, North Dakota, South Dakota, Ohio, Massachusetts, New Jersey, Georgia, Vermont, Virginia, Rhode Island, Kentucky, Michigan, Maine, Connecticut, Idaho and Indiana partnership liability is joint. In many of these states, however, the results of joint liability as known to the common law have been modified by statute and decision. The extent of the modification varies. In some each partner must be sued severally or all jointly, an election being required. In some the partnership may be sued in the partnership name, and thereafter the partners separately until satisfaction is had. In all the estate of the deceased partner is subject to liability, but in some only after action first had against the survivors; in others proof of no partnership property must first be made; in others proceedings may be first had against the estate.

The purpose of the statutes in those states which have made the liability joint and several was to effect certain procedural results, rather than to affect the substantive law. Where, therefore, a state has already declared the liability to be joint and several, then the principle of uniformity would not be affected by that state so altering this paragraph as to make the liability joint and several, as this change, would affect only the procedural law and this act is one to make uniform the substantive law of partnership.

Section applied in Rhodes v. Terheyden, 272 Pa. 397, 116 Atl. 364 (1922).

[17] The section clears several doubts and confusions of our existing case law. It has been held that a person is liable if he has been held out as a partner and knows that he is being held out, unless he prevents such holding out, even if to do so he has to take legal action. Fletcher v. Pullen, 70 Md. 205, 16 Atl. 887, 14 Am. St. Rep. 355 (1889); Tanner v. Hall, 86 Ala. 305, 5 South. 584 (1888); Rittenhouse v. Leigh, 57 Miss. 697 (1880); Speer v. Bishop, 24 Ohio St. 598 (1874); Prof. Burdick in 30 Cyc. 393. On the other hand, the weight of authority is to the effect that to be held as a partner he must consent to the holding and that consent is a matter of fact. The act as drafted follows this weight of authority and better reasoning. Morgan v. Farrel, 58 Conn. 413, 20 Atl. 614, 18 Am. St. Rep. 282 (1890); Bishop v. Georgeson, 60 Ill. 484 (1871); Thompson v. Bank, 111 U. S. 529, 4 Sup. Ct. 689, 28 L. Ed. 507 (1884);

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

Section 17. [Liability of Incoming Partner.] A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.[18]

Fisher v. McDonald, 85 Ill. App. 653 (1899); Ihmsen v. Lathrop, 104 Pa. 365 (1884); Wood's Collyer, 75, note.

Another confusion of our existing case law arises when A. is held out with his consent as a partner of B. who is in business by himself. Here no partnership in fact exists. Can any one who relies on the representation have priority on the property in the business over those creditors of B. who trusted only B. and not A. and B.? The case of Thayer v. Humphreys, 91 Wis. 276, 64 N. W. 1007, 30 L. R. A. 549, 51 Am. St. Rep. 887 (1895), answers this question in the affirmative. Other cases have reached an opposite conclusion. Burdick, Partnership, p. 16 et seq. Clause (b) affirms this opposite conclusion. In the case put A. and B. would be liable jointly, but, as there was in fact no partnership fund, the creditor who thought there was a firm of A. and B. would have no priority on the assets which B. had in his business as distinguished from his other assets.

18 The present section eliminates the difficulty which arises when a new partner is admitted without liquidation of firm debts. The present theory of the common law is that a new partnership is formed; all the property of the partnership which existed up to the moment of the entrance of the new partner being transferred to the new partnership. The result of this theory is that if the business fails, the creditors who have extended credit after the admission of the new partner have a prior claim on the assets in the business. The inequitable character of this result has led the courts, where no notice of the change of membership is had by the creditors, to be diligent in finding an assumption of liability on the part of the new partnership of the debts of the old partnership.

Though this section changes the formal statement of the law, which is to the effect that an incoming partner is not liable for debts contracted before his admission, as a matter of fact the section as worded conforms to the actual decisions of the courts, which, however, are arrived at by making every effort to impress an assumption of liability on the part of the new partnership, formed as a result of the admission of the new partner, of the debts of the old partnership.

The difficulty, which is overcome by this section as worded, is illustrated by the common case where all the property of the existing partnership is taken over, without notice of any break in the conduct of business, by the new partnership composed of all the members of the existing partnership and the incoming partner; thereby depriving the existing partnership of all its property. Both the existing and the subsequent creditors may believe it is one and the same partnership, but, as stated, such would not be the case under the present law. There is no peculiar equity in the subsequent creditors giving them a right to be preferred, as against the property employed in the business, to the existing creditors. The incoming partner partakes of the benefit of the

PART IV—RELATIONS OF PARTNERS TO ONE ANOTHER

Section 18. [Rules Determining Rights and Duties of Partners.] The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(c) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(d) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(e) All partners have equal rights in the management and conduct of the partnership business.

(f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(g) No person can become a member of a partnership without the consent of all the partners.

(h) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners;

partnership property and an established business. He has every means of obtaining full knowledge and protecting himself, because he may insist on the liquidation or settlement of existing partnership debts. The creditors have no means of protecting themselves. So as to preserve the present law as nearly as possible it is declared that the liability of the incoming partner shall be satisfied only out of partnership property. It, therefore, results that existing and subsequent creditors have equal rights as against partnership property and the separate property of all the previously existing members of the partnership, while only the subsequent creditors have rights against the separate estate of the newly admitted partner.

The section should be read in connection with section 41, infra. Both sections are based on the principle that where there has been one continuous business the fact that A. has been admitted to the business, or C. ceased to be connected with it, should not be allowed to cause, as at present, endless confusion as to the claims of the creditors on the property employed in the business; but that all the creditors of the business, irrespective of the times when they became creditors and the exact combinations of persons then owning the business, should have equal rights in such property. The recognition of this principle solves one of the most perplexing problems of present partnership law.

but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

Section 19. [Partnership Books.] The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

Section 20. [Duty of Partners to Render Information.] Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

Section 21. [Partner Accountable as a Fiduciary.] (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.[19]

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

Section 22.[20] [Right to an Account.] Any partner shall have the right to a formal account as to partnership affairs:

(a) If he is wrongfully excluded from the partnership business or possession of its property by his copartners,

(b) If the right exists under the terms of any agreement,

(c) As provided by section 21,

(d) Whenever other circumstances render it just and reasonable.

19 This paragraph removes a doubt in the existing law. At present it is not clear whether the obligation to account where the partner has money or other property in his hands, is or is not an obligation in the nature of a trust. For instance: A., B. and C. are partners; A., as a result of a transaction connected with the conduct of the partnership, has in his hands, so that it may be traced, a specific sum of money or other property. A. is insolvent. Is the claim of the partnership against A. a claim against him as an ordinary creditor, or is it a claim to the specific property or money in his hands? The words "and hold as trustee for the partnership any profits" indicate clearly that the partnership can claim as their own any property or money that can be traced.

20 Ordinarily a partner is not entitled to a formal account, except on dissolution. He has equal access with his partners to the partnership books, and there is no reason why they should constantly render to him accounts in the formal sense of that word, which is the sense in which it is here used. When, however, he is excluded from the business or the possession of partnership property, without any express agreement authorizing such exclusion, he should have the right to demand a formal account from his partners, without necessarily requiring him to dissolve the partnership.

The reason for clause (d) is that there frequently arises circumstances which impose on one or more of the partners the duty of rendering a formal account to the copartner, as where one partner is traveling for a long period of time on partnership business, and the other partners are in possession of the partnership books. These various circumstances cannot be detailed in any act. In view of the wording of clause (d), the total effect of this section is to emphasize the fact, that a partner, the partnership not being dissolved, has not, necessarily, the right to demand formal accounts except at particular times and under particular circumstances.

Section 23. [Continuation of Partnership Beyond Fixed Term.] (1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is prima facie evidence of a continuation of the partnership.

PART V—PROPERTY RIGHTS OF A PARTNER

Section 24. [Extent of Property Rights of a Partner.] The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

Section 25. [Nature of a Partner's Right in Specific Partnership Property.]

(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.[21]

[21] One of the present principal difficulties in the administration of the law of partnerships arises out of the difficulty of determining the exact nature of the rights of a partner in specific partnership property. That the partners are co-owners of partnership property is clear; but the legal incidents attached to the right of each partner as co-owner are not clear. When the English courts in the seventeenth century first began to discuss the legal incidents of this co-ownership they were already familiar with two other kinds of co-ownership, joint tenancy and tenancy in common. In joint tenancy on the death of one owner his right in the property passes to the other co-owners. This is known as the right of survivorship. The incident of survivorship fits in with the necessities of partnership. On the death of a partner, the other partners and not the executors of the deceased partner should have a right to wind up partnership affairs. See clause (d), infra. The early courts, therefore, declared that partners were joint tenants of partnership property, the consequence being that all the other legal incidents of joint tenancy were applied to partnership co-ownership. Many of these incidents, however, do not apply to the necessities of the partnership relation and produce most inequitable results. This is not to be wondered at because the legal incidents of joint tenancy grew out of a co-ownership of land not held for the purposes of business. The attempt of our courts to escape the inequitable results of applying the legal incidents of joint tenancy to partnership has produced very great confusion. Practically this confusion has had more unfortunate effect on substantive rights when the separate creditors of a partner attempt to attach and sell specific partnership property, than when a partner attempts to assign specific partnership property not for a partnership purpose but for his own purposes.

The commissioners, however, believe that the proper way to end the confusion which has arisen out of the attempt to treat partners as joint tenants, is to recognize the fact that the rights of a partner as co-owner with his partners of specific partnership property should depend on the necessities of the partnership relation. In short that the legal incidents of the tenancy in partnership are not necessarily those of any other co-ownership.

In the clauses of this section these incidents of tenancy in partnership are stated with several practical results of value. In the first place the law is greatly simplified in expression. In the second place the danger of the courts

(2) The incidents of this tenancy are such that:

(a) A partner, subject to the provisions of this act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of rights of all the partners in the same property.[22]

reaching an inequitable conclusion by refusing to modify the results of applying the legal incidents of joint tenancy to the partnership relation, is done away with. Finally, ground is laid for the simplification of a procedure in those cases where the separate creditor desires to secure satisfaction out of his debtor's interest in the partnership. Compare clause (c) with section 28 (1).

22 Clause (b) asserts that the right of a partner as co-owner in specific partnership property is not separately assignable. This peculiarity of tenancy in partnership is a necessary consequence of the partnership relation. If A. and B. are partners, and A. attempts to assign all his right in partnership property, say a particular chattel, to C., and the law recognizes the possibility of such a transfer, C. would pro tanto become a partner with B.; for the rights of A. in the chattel are to possess the chattel for a partnership purpose. But partnership is a voluntary relation. B. cannot have a partner thrust upon him by A. without his (B.'s) consent. A. cannot confer on C. his (A.'s) right to possess and deal with the chattel for a partnership purpose. Neither can he confer any other rights which he has in the property. A partner has a beneficial interest in partnership property considered as a whole. As profits accrue, he has a right to be paid his proportion, and on the winding up of the business, after the obligations due third persons have been met, he has a right to be paid in cash his share of what remains of the partnership property. These rights considered as a whole are his interest in the partnership; and this beneficial interest he may assign in whole or fractional part, as is indicated in section 27, infra. In a sense, each partner, having thus a beneficial interest in the partnership property considered as a whole, has a beneficial interest in each part, and such beneficial interest might be regarded as assignable if it were not impossible, except by purely arbitrary and artificial rules, to measure a partner's beneficial interest in a specific chattel belonging to the partnership, or any other specific portion of partnership property.

A single illustration will make clear the impossibility of determining a partner's beneficial interest in any single piece of partnership property. Let us suppose A. and B. are partners. The value of partnership property is \$100,000; the liabilities amount to \$50,000. A. has contributed \$15,000 and has a three-fourths interest in the profits; B. \$10,000 and has a one-fourth interest in the profits. A. attempts to assign his interest in certain definite chattels belonging to the partnership, the value of these chattels being \$5,000. The chattels themselves must be still used for partnership purposes. On dissolution, if still part of the partnership property, they must be sold. If A. conveyed anything, it was not a right in these chattels, but in a fractional part of his interest in the partnership. But how is it to be determined what fractional part of his interest in the partnership A. intended to assign? Did he intend to give B. a lien for \$5,000 on his interest, or a lien on his interest for three-fourths—his share of the profits—of \$5,000? Or did he intend to give him a lien on his interest in the partnership which in amount should bear the same proportion to the total value of the chattel, \$5,000, as the amount which he would receive should the partnership be liquidated, bears to the total of the present partnership property? It is impossible to answer these questions. If the assigning partner did not intend to dissolve the partnership it is even impossible to analyze the possible intentions. Of course, in practice, a partner

who assigns his "interest in particular partnership chattels," has only the vaguest notion of what he intends.

Clause (b) not only states a principle theoretically sound, it expresses almost the unbroken current of authority if we confine our investigation to cases relating to attempted voluntary assignments, as distinguished from involuntary assignments, the result of adverse proceedings by a separate creditor of a partner.

Thus in Cayton v. Hardy, 27 Mo. 536 (1858), two were partners in a farm. One, without the consent of the other, sold two yoke of oxen, the property of the partnership used in the work of the farm. He delivered the oxen to the purchaser. The copartner brought an action against the purchaser and recovered possession. In Drake v. Thyng, 37 Ark. 228 (1881), the copartners, after an assignment by one of his interest in a partnership chattel, recovered possession by proceedings in equity, and in McNair v. Wilcox, 121 Pa. 437, 15 Atl. 575, 6 Am. St. Rep. 799 (1888), the copartners recovered in an action of trover and conversion against a purchaser who refused to return the property. In Freeman v. Abramson, 30 Misc. Rep. 101, 61 N. Y. Supp. 839 (1899), the court held that a partner who had "assigned the partnership stock" was a necessary party in a suit for the replevin of the goods brought by the other partners, as the assignment did not deprive the assignee of any interest in the property. These cases are direct authority for the proposition that the attempted assignment of a partnership chattel by a partner, or of his interest in the chattel, does not make the purchaser and the other partners joint tenants or tenants in common of the chattel, for one joint tenant or one tenant in common cannot recover possession from his cotenant.

An assignment, by way of mortgage, of specific partnership property the assignment not being an act within the power of the partner creating the mortgage, confers no rights of possession on the mortgagee. Wilcox v. Jackson, 7 Colo. 521, 4 Pac. 966 (1884). Nor can such mortgagee prevent the property from being applied to the payment of partnership debts, though thereby all the mortgagee's rights, if any, are destroyed. McGrath v. Cowen, 57 Ohio St. 385, 49 N. E. 338 (1898); Osborne v. Barge, 29 Fed. 725 (Cir. Ct. N. D. Iowa 1887). There are indeed, at least two cases which have regarded the partner assigning, by way of mortgage, his interest in specific partnership property as mortgaging something: Arnold v. Stevenson, 2 Nev. 234 (1866); Sutlive v. Jones, 61 Ga. 676 (1878); but in neither case did the court indicate how the value of the interest of the partner could be determined.

After an attempted assignment by a partner, invalid as against his copartner, of all the partnership property, it has been held that both partners, as partners, have an insurable interest in the property. Kimball v. Hamilton Fire Ins. Co., 21 N. Y. Super. Ct. 495 (1861).

Of course, an attempted assignment of all the partnership property, void as an assignment of the rights of either of the partners in the property, or an attempted assignment by one partner of his rights in all the partnership property, may be regarded as a valid assignment of the partner's interest in the partnership. For instance, in Nicoll v. Mumford, 4 Johns. Ch. (N. Y.) 522 (1820), the entire property of the partnership was the brig Phœnix and her cargo. One partner assigned "all his estate real and personal," according to a schedule annexed to the deed of assignment, the schedule including the brig Phœnix and her cargo. Chancellor Kent regarded the deed as assigning the partner's interest in the partnership. Whatever the merits of this decision, it is not authority for the proposition that a partner's right in one or more of the chattels of the partnership may be separately assigned. It merely stands for the proposition that a particular act—the attempted assignment of the partnership property—was, under the circumstances of that case, an assignment, not of the chattels, the brig and her cargo, but of the interest of the assignor in the partnership. Compare Horton's Appeal, 13 Pa. 67 (1850). In Miller v. Brigham, 50 Cal. 615 (1875), A. and B. were partners. A "sold and conveyed" to C. "all his (A.'s) one undivided one-half interest in the property." The court was of the opinion, though the question was not directly before them, that A. had assigned to C. his interest in the partnership. The case does decide that C. had no right to possess any of the partnership property.

Against this uniform current of authority we know of only one case where the voluntary assignment by a partner of a chattel belonging to partnership,

not being valid as a collective assignment of the rights of all the partners in the property, nevertheless vested rights in the chattels in the assignee. The case is Blaker v. Sands, 29 Kan. 551 (1883). A. and B. were partners, the business being the improvement of a flock of sheep. In the temporary absence of B., A. sold and delivered all the sheep to C. As the partnership was for the improvement, not for the sale of the sheep, their sale was beyond the scope of A. as partner. A. died, and B. brought an action against C. for the possession of the sheep. The trial court refused to admit C.'s offer of the bill of sale of the sheep, and a verdict in favor of B. was given. On appeal a new trial was awarded on the theory, that while C.'s assignment did not transfer the rights of B. in the sheep, it made B. and C. tenants in common, and, therefore the bill of sale was a defense to B.'s action, and should have been admitted in evidence. The practical result of the decision was to deny to the surviving partner the right to obtain possession of partnership property, though, of course, he was liable for all the partnership debts. The adoption of clause (b) as drafted would make such a decision impossible.

It will be noted that this clause deals with what may be called the quality of assignability. It asserts that the right in specific partnership property is assignable collectively with the rights of the other partners; or, to put the matter in another way, it is possible to assign the rights of all the partners—the rights of the partnership—in partnership property, but it is not possible to assign separately the right of an individual partner.

It is important to note that the clause does not deal with the person or persons who may make an assignment of partnership property, or with the acts necessary to a conveyance of title. Indeed, the act as a whole, except in the case of a conveyance of land belonging to a partnership (see section 11, paragraphs 2, 3, 4, 5, 6), does not attempt to deal with any question pertaining to the transfer of title. The act, however, does deal in section 9 (1) with the authority of a partner to bind the partnership. Clause (b) asserts that partnership property is assignable while section 9 (1) indicates when a partner has authority to make an assignment of partnership property; but neither tells us what the partner, in view of what we may call the rules of conveyancing, must do in order to transfer the title to a stranger, or even whether, in view of those rules it is possible for him, acting alone to transfer title. For instance A. and B. are partners in the retail dry goods business. In the course of the business A. sells and delivers to C. part of the stock in trade. Clause (b) indicates that the rights of A. and B. in the goods are collectively assignable; section 11 (1) that A. had the authority to make the sale and deliver the goods. But whether a good title has, by the sale and delivery, been vested in C. is a question pertaining to the transfer of title to chattels. Delivery passes the title of the owner when the delivery is by the owner or with his consent. C., therefore, in the case put, obtains a good title. It is no part of the business of a partnership act, however, to deal with such a question; unless, as in the case of land, it is considered desirable to introduce a new method of transfer of title, or to make clear confusions in the law, which confusions exist only in cases connected with property held by a partnership. In all other cases, as in the illustration given, the requirements of a partnership act are satisfied if the co-ownership of partnership property is stated, the collective assignability of the rights of all the partners emphasized, and the extent of the agency of the partner to act for his copartners indicated.

The importance of seeing clearly the exact scope of clause (b) warrants two additional illustrations. If A., in the case above put, instead of selling and delivering part of the stock, should attempt to sell and should deliver a counter or table on which the goods were sold, would the purchaser obtain a good title? Clause (b) does not answer this question. It merely states that the table, being partnership property, the rights of all the partners in it are subject to collective assignment. This is what A. has attempted to do. But the clause does not tell us whether A. had, under the circumstances, power to make the assignment or whether, having the power, he has done so. Neither does section 11 (1) answer either of these questions. Section 11 (1) tells us that A. has, under the circumstances, no authority to bind the partners as the act is not an act for apparently carrying on in the usual way the business of the partnership. But whether A. has the power to make the conveyance depends on the law of transfer of title to chattels—a subject beyond the scope of the

(c) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.[23]

(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

act. Under ordinary circumstances, C. would obtain no title to B.'s rights, as it is a fundamental rule pertaining to the transfer of titles to chattels, that the right of the true owner is not transferred by the sale and delivery of an agent in possession, unless the owner has done something to clothe the agent with the apparent power of sale, the delivery of the chattel by the owner to the agent or bailee not being considered such an act.

Finally, suppose A. and B. are in partnership, the business of the partnership being the buying and selling of land. The title to a particular tract is in A. and B. A. sells X. to C., giving C. a deed signed by A., but not by B. The land being partnership property the rights of A. and B. are collectively assignable. A. has attempted to make such an assignment. The business of the partnership being "trading in land," the sale was an act which the partner had authority to do. But whether the deed signed by one partner only in his own name conveyed to B. title is again a question of conveyancing, and normally outside the province of a partnership act. In this case, however, section 11 (4) does deal with the transfer of the equitable title, declaring that it is, under the circumstances, vested in C.

[23] Compare this clause with section 28 (1).

The first sentence in this clause is similar to section 23 (1) of the English Act. It is a logical consequence of clause (b). If a partner's right in specific partnership property is not assignable by voluntary assignment for a separate purpose of the assigning partner, his separate creditors should not be able to force an involuntary assignment. The beneficial rights of the separate creditors of a partner in partnership property should be no greater than the beneficial rights of their debtor. The confusion of the subject of this clause in the decisions is well known to all students of the law of partnership. For all practical purposes, while the reasoning of the courts is more or less conflicting the net result of the remedial law, as worked out in law and at equity, is that a judgment creditor of a separate partner may attach and sell his debtor's interest in partnership property as that interest is defined in section 26 (see section 28); but he cannot sell, so as to affect in any way the rights of the partnership, specific partnership property. See Heydon v. Heydon, 1 Salk. 392 (1693); Eddie v. Davidson, 2 Dougl. 650 (1781); Taylor v. Fields, 4 Ves. 396 (1799); Lord v. Baldwin, 23 Mass. (6 Pick.) 348 (1828); Doner v. Stauffer, 1 Pen. W. (Pa.) 198, 21 Am. Dec. 370 (1829); Tappan v. Blaisdell, 5 N. H. 190 (1830); Phillips v. Cook, 24 Wend. (N. Y.) 389 (1840); Washburn v. Bank of Bellows Falls, 19 Vt. 278 (1847); Nixon v. Nash, 12 Ohio St. 647, 80 Am. Dec. 390 (1861); Cooper's Appeal, 26 Pa. 262 (1856); Menagh v. Whitwell, 52 N. Y. 146, 11 Am. Rep. 683 (1873); Case v. Beauregard, 99 U. S. 119, 25 L. Ed. 370 (1878).

The second sentence in the paragraph apparently expresses the weight of authority. See Burdick, 111–113, 299. A partner has a right to claim exemption if his interest in the partnership is attached for his separate debts. See section 28 (3), infra.

Section 26. [Nature of Partner's Interest in the Partnership.] A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

Section 27. [Assignment of Partner's Interest.] (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.[24]

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

Section 28. [Partner's Interest Subject to Charging Order.] (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.[25]

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

24 In re the subject of this paragraph, see George, 153; Beale's Parsons, §§ 106, 305, 306; Story, §§ 272, 377, 308; Bates, §§ 158-168, 931-933; Lindley, 397 et seq. 620; Jas. Parsons, § 175; Collyer, 151, 161; Kent, 59. These authorities on the whole state that the mere assignment dissolves the partnership. Many such assignments, however, are merely by way of collateral security for a loan, the assigning partner in no wise intending to end the partnership relation. If he neglects his personal relation the other partners may dissolve the partnership under section 31 of this act. But the mere fact of assignment without more should not be said in all cases to be an act of dissolution. The change in the existing law follows a similar change of the English law embodied in section 31 of the English Partnership Act.

25 This provision is taken from section 23 (2) of the English Partnership Act. The operation of the provision has given great satisfaction. The judgment creditor does not acquire any greater rights than the debtor is entitled to for his own benefit. Sutton v. English & Colonial Produce Co., [1902] 2 Ch. 502; Howard v. Sadler, [1893] 1 Q. B. 1; Cooper v. Griffin, [1892] 1 Q. B. 740; Scott v. Lord Hastings, 4 K. & J. 633 (1858).

(3) Nothing in this act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

PART VI—DISSOLUTION AND WINDING UP

Section 29. [Dissolution Defined.] The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.[26]

Section 30. [Partnership Not Terminated by Dissolution.] On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

Section 31.[27] [Causes of Dissolution.] Dissolution is caused: (1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

[26] As used by the legal profession the term "dissolution" designates, not only the single act of the termination of the actual conduct of the ordinary business, but also often the series of acts thereafter until the final settlement of all partnership affairs. It is also frequently said, that dissolution, although the word is used to designate only the termination of ordinary business relations, terminates the partnership, it being at the same time explained that the partnership thereafter continues to exist for the purpose of suing and being sued in the process of winding up partnership affairs. Certainty demands that this confusion should be removed if possible. In this act dissolution designates the point in time when the partners cease to carry on the business together; termination is the point in time when all the partnership affairs are wound up; winding up the process of settling partnership affairs after dissolution.

[27] Paragraph (2) will settle a matter on which at present considerable confusion and uncertainty exists. The paragraph as drawn allows a partner to dissolve a partnership in contravention of the agreement between the partners. This is supported by the weight of authority. Cal. Civ. Code, § 2417; S. D. Civ. Code, 1908, § 1736; Okl. C. C. § 4850; N. D. Civ. Code, § 5848; Mont. Civ. Code 1895, § 3262; Ga. Civ. Code 1895, § 2633; Skinner v. Dayton, 19 Johns. (N. Y.) 513, 537,—10 Am. Dec. 286 (1822); Mason v. Connell, 1 Whart. (Pa.) 381, 388 (1836); Monroe v. Conner, 15 Me. 178, 32 Am. Dec. 148 (1838); Cape Sable Co.'s Case, 3 Bland (Md.) 606, 674 (1840); Slemmer's Appeal, 58 Pa. 168, 176, 98 Am. Dec. 255 (1868); Solomon v. Kirkwood, 55 Mich. 256, 21 N. W. 336 (1884); Carr v. Hertz, 54 N. J. Eq. 127, 33 Atl. 194 (1895); Moore v. Price, 116 Ala. 247, 22 South. 531 (1896); Karrick v. Hannaman, 168 U. S. 328, 334, 18 Sup. Ct. 135, 42 L. Ed. 484 (1897); Lapenta v. Lettieri, 72 Conn. 377, 44 Atl. 730, 77 Am. St. Rep. 315 (1899); Clements v. Norris, 8 Ch. D. 129, 133 (1878). The English law is opposed to this view. Lindley, 601; Crawshay v. Maule, 1 Swanst. Ch. 509 (1818); Featherstonhaugh v. Fenwick, 17 Ves. 298 (1810); Peacock v. Peacock, 16 Ves. 49 (1809); Ferrero v. Buhlmeyer, 34 How. Prac. (N. Y.) 33 (1867); Story, § 275.

The relation of partners is one of agency. The agency is such a personal one that equity cannot enforce it even where the agreement provides that the partnership shall continue for a definite time. The power of any partner to terminate the relation, even though in doing so he breaks a contract, should, it is submitted, be recognized.

The rights of the parties upon a dissolution in contravention of the agreement are safeguarded by section 38 (2), infra.

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business bona fide in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 32.

Section 32.[28] [Dissolution by Decree of Court.] (1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss,

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 27 or 28:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

Section 33. [General Effect of Dissolution on Authority of Partner.] Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy or death of a partner; or

[28] "We find nothing in the provisions of the Uniform Partnership Act of 1917, cited by counsel, restricting the inherent powers recognized as existing in a court of equity to, on a proper showing, appoint a receiver between disagreeing partners." Dolenga v. Lipka, 224 Mich. 276, 195 N. W. 90 (1923).

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where section 34 so requires.

(2) With respect to persons not partners, as declared in section 35.

Section 34.[29] [Right of Partner to Contribution From Copartners

[29] This section relates only to a partner's liability to his copartner, where a copartner, after dissolution, caused by the act of one of the parties or by the death or bankruptcy of a partner, makes a contract in the course of partnership business.

As worded, where the dissolution has been caused by the act of one of the parties, if the partner acting is subject to a liability to third persons, he can call on his copartners to contribute towards this liability to the same extent as if there had been no dissolution, provided he had no knowledge of the dissolution, at the time of the act. Mere notice, not producing knowledge, would not be sufficient. This provision makes certain that which is now uncertain. Thus A., B. and C. are partners. A., in accordance with his right, or in contravention of the agreement between the partners, declared a dissolution of the partnership. B., subsequently, makes a contract, for the partnership in ignorance of the dissolution. B. under this act would have the right to call upon A. and C. to assume their share of the burden. The Commissioners believe that, to relieve A. and C. of this duty to B., B. ought to have more than "notice" as "notice" is defined in section 3, supra. "Notice" should be, it is submitted, sufficient in all cases where the fact to be notified is an ordinary business fact, as notice to third persons of the dissolution of a partnership. But it is not customary for partners to dissolve a partnership at a time not previously specified, without consultation with their copartners. Such dissolution may or may not amount to a breach of partnership contract; but in any event, if done without consultation, it is out of the ordinary course. This fact should not deprive the partner of a right to terminate a relationship which must necessarily depend on mutual good will and confidence; but if the partner so terminating wishes to show that he should not be required by his partners to be liable for his share of the loss due to a partnership contract thereafter made by them, he should be able to prove that they had "knowledge" that he had dissolved the partnership at the time they made the contract.

Clause (b) makes a change in the law. Beale's Parsons, §§ 309, 310, 318, 342, 343, 351; Mechem, §§ 245, 258, 259, 260, 261, 266; Collyer, §§ 102, 103; 30 Cyc. 653, 670; Story, §§ 265 et seq., 319, 334, 336; Bates, 570 et seq.; Conyngton, §§ 53, 72; Burdick, 56; Shumaker, §§ 119, 120; 3 Kent, Com. 53. At present where the partnership is terminated by operation of law, i. e., by death, bankruptcy, by being unlawful, or by decree of court, every person "must take" notice of such facts. This statement is made generally and includes the partners. As to the partners, to whom only this provision relates the Commissioners agree that they must not expect relief if the partnership or the business is unlawful, or if they have actual knowledge or notice of dissolution by decree of court; but the Commissioners do not believe that the partners do have actual knowledge or should "take notice" of the death or of the bankruptcy of any one partner. In the case of death to hold that a partner acting for the partnership bona fide in ignorance of the death of one of his copartners must assume the entire liability, even though all other partners are ignorant of the death of the partner, and even though such deceased partner was entirely inactive and may have resided at any distance from the actual place of business, is entirely unjust to the acting partner or partners. The rule of the common law has been modified as to the law of agency. Story on Agency (1882) 598; Cassiday v. McKenzie, 4 Watts & S. (Pa.) 282, 39 Am. Dec. 76 (1842); Cal. Civ. Code, § 2356; Dak. C. C. §§ 1150. 1151; Md. Rev. Code 1878, p 388, art. 44, § 31; Saunders' Rev. Civ. Code La. 1909, § 3032; S. C. Gen. St. 1882, § 1302; Kent, Comm. 646; Mechem on Agency, § 245; Blackwood Wright (2d Ed. Eng.) on Principal and Agent, 332 et seq.; English Conveyancing Act (1881) § 47; English Bankruptcy Act (1883) § 38. See Lindley, 240

After Dissolution.] Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his copartners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

Section 35.[30] [Power of Partner to Bind Partnership to Third Persons After Dissolution.] (1) After dissolution a partner can bind the partnership except as provided in paragraph (3)

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution;

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

et seq. The Commissioners believe that the partnership law should follow this modification.

What has been said of the death of a partner applies also to the bankruptcy of a partner. If there are a number of partners, and one of them becomes bankrupt, and another having no knowledge or notice of this fact, makes a contract in the ordinary course of the business, there appears no reason why he should not be able to call on his other partners, not bankrupt or deceased, to contribute towards any loss which his separate estate may sustain on account of the contract.

30 At present in most jurisdictions it is doubtful, whether under the circumstances set forth in (b) "the other party" can bind the partnership where such party has had no knowledge or notice of the dissolution and has had business transactions with the partnership before dissolution, but these business transactions have not involved any extension of credit to the partnership.

In support of the provision, as written, see Beale's Parsons, § [illegible], Mechem, § 262; Burdick, 57; 2 Bates, §§ 613, 614; 30 Cyc. 671; Cal. Civ. Code, § 2453. There is also authority for merely requiring that "the other party" shall have had business transactions with the partnership. James Parsons, §§ 179, 180, 181; Lindley, 249; Pollock, 98; 3 Kent Comm. 67; Collyer, [illegible]; Shumaker, § 121; Mechem, 261, 262; Bates, 612, 613.

The practical impossibility of the partners knowing by any feasible system of bookkeeping, all the persons with whom they have had dealings, unless credit has been extended, supports the wording adopted by the Commissioners.

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs; except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1bII).

(4) Nothing in this section shall affect the liability under section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

Section 36. [Effect of Dissolution on Partner's Existing Liability.] (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.[31]

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

Section 37. [Right to Wind Up.] Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; provided, however, that

[31] Drake v. Hodgson, 118 Misc. Rep. 503, 194 N. Y. Supp. 874 (1922); Le Gault v. Lewis-Zimmerman, 28 Wyo. 474, 206 Pac. 157 (1922).

any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the court.

Section 38.[32] [Rights of Partners to Application of Partnership Property.] (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner as against his copartners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, bona fide under the partnership agreement and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36(2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

(I) All the rights specified in paragraph (1) of this section, and

(II) The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2aII) of the section, and in like manner indemnify him against all present or future partnership liabilities.

(c) A partner who has caused the dissolution wrongfully shall have:

(I) If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2aII), of this section,

(II) If the business is continued under paragraph (2b) of this section the right as against his copartners and all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his copartners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be released

[32] The right given to each partner, where no agreement to the contrary has been made, to have his share of the surplus paid to him in cash makes certain an existing uncertainty. At present it is not certain whether a partner may or may not insist on a physical partition of the property remaining after third persons have been paid.

from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

Section 39. [Rights Where Partnership is Dissolved for Fraud or Misrepresentation.] Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, without prejudice to any other right, entitled,

(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

Section 40. [Rules for Distribution.] In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are;

(I) The partnership property,

(II) The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.[33]

(b) The liabilities of the partnership shall rank in order of payment, as follows:

(I) Those owing to creditors other than partners,

(II) Those owing to partners other than for capital and profits,

(III) Those owing to partners in respect of capital,

(IV) Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section 18 (a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of

33 The adoption of this clause will end the present confusion as to whether the contributions of the partners towards the losses of the partnership are partnership assets or not. See In re Bertenshaw, 157 Fed. 363, 85 C. C. A. 61, 17 L. R. A (N. S.) 886, 13 Ann. Cas. 986 (1907); In re Forbes (D. C.) 128 Fed. 137 (1904); Barry v. Foyles, 1 Pet. 311, 7 L. Ed. 157 (1828); George M. West Co. v. Lea Bros., 174 U. S. 590, 19 Sup. Ct. 836, 43 L. Ed. 1098 (1899); Vaccaro v. Bank, 103 Fed. 436, 43 C. C. A. 279 (1900); In re Mercur, 122 Fed. 384, 58 C. C. A. 472 (1903). The Commissioners believe that the opinion that such contributions are assets is supported by the better reasoning. See In re Forbes, supra.

the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(h) When partnership property and the individual properties of the partners are in possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

(I) Those owing to separate creditors,

(II) Those owing to partnership creditors,

(III) Those owing to partners by way of contribution.

Section 41. [Liability of Persons Continuing the Business in Certain Cases.] (1) When any new partner is admitted into an existing partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.[34]

[34] As originally passed by the Conference, paragraph 1 of section 41 read as follows:

"When any partner retires and assigns (or the representative of a deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons who continue the business without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the partnership so continuing the business."

It was subsequently pointed out that section 41 did not cover the situation which arises when a partnership is dissolved and a new partnership formed by the introduction of a new partner into the business without the liquidation of the affairs of the first partnership, and that it would be best not to rely on section 17, supra, to take care of the situation. The paragraph, reworded, as now printed, was submitted to the Commissioners present at the last Conference and they have signified their approval of the change.

The section as a whole deals primarily with the rights of creditors when a new partner is admitted or a partner retires, is expelled or dies, and the business is continued without liquidation of the debts of the partnership dissolved by the change in personnel.

At present the whole subject is in doubt and confusion. It is universally

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of the dissolved partnership are also creditors of the person or partnership so continuing the business.[35]

admitted that any change in membership dissolves a partnership, and creates a new partnership. This section as drafted does not alter that rule. Neither does it alter the rule that on any change of personnel the property of the dissolved partnership becomes the property of the partnership continuing the business. At present, however, creditors of the dissolved partnership do not become creditors of the new partnership. Thus, if A., B. and C. are partners and A. assigns to B. and C., who continue the business without any agreement to pay the partnership debts, under the present law the property of the first partnership becomes the property of the second partnership, but the creditors of the first partnership are not the creditors of the second partnership, though they are the creditors of all of the members of that partnership. Such creditors, therefore, are often unable to secure satisfaction of their claims, though at the time of the assignment the partnership was solvent, and the business may have been continued by the second partnership without any notification of the change in membership. On the other hand, the creditors of the second partnership may be paid in full out of the property. This inequitable result the courts have attempted, in not a few instances, to prevent, by declaring that the assignment of the property of the first partnership to the second partnership was a fraud on the creditors of the first partnership, though no fraud was intended, the result being that the creditors of the second partnership are postponed until the creditors of the first partnership are paid in full.

The paragraph as drawn changes the law in the case supposed, and, thereby, does away with an injustice. In making the creditors of the first partnership creditors of the second it prevents such an assignment from affecting the rights of partnership creditors in the property embarked in the business.

Again, in the case supposed if B. and C. promise to pay the debts of the partnership of A., B. and C., it is uncertain whether the court will hold that they promise as individuals or as a new partnership. If as individuals the old partnership creditors are not creditors of the new partnership. If A. and B. are considered as promising as a new partnership, then, whether the old partnership creditors can sue the new partnership as beneficiaries depends on the jurisdiction. The paragraph as drawn ends this uncertainty. In every case the creditors of the first partnership become creditors of the second; though, of course, they do not cease to be creditors of the first partnership. As, however, the first partnership has assigned all its property, this is of little value to such creditors, unless the assignees have promised the retiring partner an additional consideration beyond the payment of the debts. The status of such additional consideration is treated in paragraph (8), infra.

The paragraph as a whole, as well as this entire section, is based on the opinion that when there is a continuous business carried on first by A., B. and C., and then by A., B., C. and D., or by B. or C., or by B. and C., or by B. and D., or by C. and D., or by B., C. and D., without any liquidation of the affairs of A., B. and C., both justice and business convenience require that all the creditors of the business, irrespective of the exact grouping of the owners at the times their respective claims had their origin, should be treated alike, all being given an equal claim on the property embarked in the business. Compare note to section 17 supra.

35 Where all the partners assign to one partner the partnership creditors are, under this paragraph, the separate creditors of the partner continuing the business, where he continues the business alone, whether such partner promises to pay the debts of the dissolved partnership or not. If he takes

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.[36]

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.[37]

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38 (2b), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the part-

one or more new partners and they continue the business with the property of the dissolved partnership, the creditors of the dissolved partnership are the creditors of the partnership continuing the business. This paragraph changes the present law to the same extent as paragraph (1).

36 The paragraph extends the principle of the first and second paragraphs of the section to the case where the business is continued by two or more of the partners, alone or with others, after the retirement or death of a partner without any formal assignment to them of the retired or deceased partner's rights in partnership property. The neglect of the retiring partners or of the representatives of the deceased partner should not as at present create inexecrable confusion between the creditors of the first and second partnership in regard to their respective rights in the property employed in the business. Both classes of creditors should be ahead of the claim of such retired partner or the representative of the deceased partner, and both classes of creditors should also have equal rights in the property. This paragraph probably effects a change in the present law, though the same result is often now brought about by implying a promise to pay the debts of the dissolved partnership on the part of the person or partnership continuing the business.

37 The existing law in relation to the subject-matter covered by this paragraph is so uncertain that it is not possible to say whether its adoption would modify the law. The paragraph does not apply to the case where the third person or persons do not promise to pay the debts of the dissolved partnership. In that case the creditors of the dissolved partnership have no claim on the partnership continuing the business or its property unless the assignment can be set aside as a fraud on creditors, or is affected by a Sales in Bulk Act. Where, however, there has been a promise to pay the debts of the dissolved partnership, then, the creditors of the dissolved partnership are not only creditors of the promisor or promisors—which, in the United States, they would be as beneficiaries—but under this paragraph, if the business of the dissolved partnership is continued by a partnership, the creditors of the dissolved partnership become creditors of the partnership continuing the business—not merely the separate or joint creditors of the partners in such partnership.

nership continuing the business, under this section, to the creditors of the dissolved partnership shall be satisfied out of partnership property only.[38]

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.[39]

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceased partner liable for any debts contracted by such person or partnership.

Section 42. [Rights of Retiring or Estate of Deceased Partner When the Business is Continued.] When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6), or section 38 (2b), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal repre-

38 The paragraph merely reiterates the principle of section 17, supra, which is that an incoming partner should be liable for the existing debts of the partnership, but that this liability should be limited to his right in partnership property. Though in cases under this section the person who joins the business on the dissolution of the first partnership is not an incoming partner, because the first partnership is dissolved. Under the circumstances, his liability for the debts of the business contracted before his admission should be the same as that of an incoming partner, if confusion is to be avoided in respect to the rights in the property employed in the business, between the creditors who were creditors before he joined the business and those who became creditors afterwards.

39 Suppose A., B. and C. are partners and A. retires, assigning his interest to B. and C., who continue the business with the property of the dissolved partnership, promising to pay A. $2,000. On the subsequent failure of both partnerships under paragraph (1) of this section, the creditors of the first partnership would be also creditors of the second. By the assignment the property employed in the business would be the property of the second partnership. By his contract A. would be a creditor of the second partnership for $2,000; but this claim, A. being insolvent, would belong under the wording of this paragraph, not to A.'s separate estate, but to the creditors of the first partnership.

The uncertainty of existing law renders it impossible to say whether the adoption of this paragraph would change the law. The Commissioners believe that certainty of the law is essential, and that the rule stated in the paragraph is sound. A., in the case put, has sold his property rights in the partnership before settling with the creditors of the partnership, and, therefore, those creditors should have an equitable lien on the consideration of the sale as against the separate creditors of the retiring partner, or as against the representatives of a deceased partner who have sold the rights of their decedent to the persons continuing the business.

sentative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; provided that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as provided by section 41 (8) of this act.

Section 43. [Accrual of Actions.] The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

PART VII—MISCELLANEOUS PROVISIONS

Section 44. [When Act Takes Effect.] This act shall take effect on the ——— day of ——— one thousand nine hundred and ———.

Section 45. [Legislation Repealed.] All acts or parts of acts inconsistent with this act are hereby repealed.

UNIFORM LIMITED PARTNERSHIP ACT

EXPLANATORY NOTE

The business reason for the adoption of acts making provisions for limited or special partners is that men in business often desire to secure capital from others. There are at least three classes of contracts which can be made with those from whom the capital is secured: One, the ordinary loan on interest; another, the loan where the lender, in lieu of interest, takes a share in the profits of the business; third, those cases in which the person advancing the capital secures, besides a share in the profits, some measure of control over the business.

At first, in the absence of statutes the courts, both in this country and in England, assumed that one who is interested in a business is bound by its obligations, carrying the application of this principle so far, that a contract where the only evidence of interest was a share in the profits made one who supposed himself a lender, and who was probably unknown to the creditors at the times they extended their credits, unlim-

itedly liable as a partner for the obligations of those actually conducting the business.

Later decisions have much modified the earlier cases. The lender who takes a share in the profits, except possibly in one or two of our jurisdictions, does not by reason of that fact run a risk of being held as a partner. If, however, his contract falls within the third class mentioned, and he has any measure of control over the business, he at once runs serious risk of being held liable for the debts of the business as a partner; the risk increasing as he increases the amount of his control.

The first Limited Partnership Act was adopted by New York in 1822; the other commercial states, during the ensuing 30 years, following her example. Most of the statutes follow the language of the New York statute with little material alteration. These statutes were adopted, and to a considerable degree interpreted by the courts, during that period when it was generally held that any interest in a business should make the person holding the interest liable for its obligations. As a result the courts usually assume in the interpretation of these statutes two principles as fundamental.

First. That a limited (or as he is also called a special) partner is a partner in all respects like any other partner, except, that to obtain the privilege of a limitation on his liability, he has conformed to the statutory requirements in respect to filing a certificate and refraining from participation in the conduct of the business.

Second. The limited partner, on any failure to follow the requirements in regard to the certificate or any participation in the conduct of his business, loses his privilege of limited liability and becomes, as far as those dealing with the business are concerned, in all respects a partner.

The courts in thus interpreting the statutes, although they made an American partnership with limited members something very different from the French Société en Commandité from which the idea of the original statutes was derived, unquestionably carried out the intent of those responsible for their adoption. This is shown by the very wording of the statutes themselves. For instance, all the statutes require that all partners, limited and general, shall sign the certificate, and nearly all state that: "If any false statement be made in such certificate all the persons interested in such partnership shall be liable for all the engagements thereof as general partners."

The practical result of the spirit shown in the language and in the interpretation of existing statutes, coupled with the fact that a man may now lend money to a partnership and take a share in the profits in lieu of interest without running serious danger of becoming bound for partnership obligations, has, to a very great extent, deprived the existing statutory provisions for limited partners of any practical usefulness. Indeed, apparently their use is largely confined to associa-

tions in which those who conduct the business have not more than one limited partner.

One of the causes forcing business into the corporate form, in spite of the fact that the corporate form is ill suited to many business conditions, is the failure of the existing limited partnership acts to meet the desire of the owners of a business to secure necessary capital under the existing limited partnership form of business association.

The draft herewith submitted proceeds on the following assumptions:

First. No public policy requires a person who contributes to the capital of a business, acquires an interest in the profits, and some degree of control over the conduct of the business, to become bound for the obligations of the business: Provided creditors have no reason to believe at the times their credits were extended that such person was so bound.

Second. That persons in business should be able, while remaining themselves liable without limit for the obligations contracted in its conduct, to associate with themselves others who contribute to the capital and acquire rights of ownership, provided that such contributors do not compete with creditors for the assets of the partnership.

The attempt to carry out these ideas has led to the incorporation into the draft submitted of certain features, not found in, or differing from, existing limited partnership acts.

First. In the draft the person who contributes the capital, though in accordance with custom called a limited partner, is not in any sense a partner. He is, however, a member of the association. See section 1.

Second. As limited partners are not partners securing limited liability by filing a certificate, the association is formed when substantial compliance, in good faith, is had with the requirements for a certificate. Section 2 (2). This provision eliminates the difficulties which arise from the recognition of de facto associations, made necessary by the assumption that the association is not formed unless a strict compliance with the requirements of the act is had.

Third. The limited partner, not being in any sense a principal in the business, failure to comply with the requirements of the act in respect to the certificate, while it may result in the non-formation of the association, does not make him a partner or liable as such. The exact nature of his ability in such cases is set forth in section 11.

Fourth. The limited partner, while not as such in any sense a partner, may become a partner as any person not a member of the association may become a partner; and, becoming a partner, may nevertheless retain his rights as limited partner; this last provision enabling the entire capital embraced in the business to be divided between the limited partners, all the general partners being also limited partners. Section 12.

Fifth. The limited partner is not debarred from loaning money or transacting other business with the partnership as any other non-

member: Provided he does not, in respect to such transactions, accept from the partnership collateral security, or receive from any partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge its obligations to persons not general or limited partners. Section 13.

Sixth. The substitution of a person as limited partner in place of an existing limited partner, or the withdrawal of a limited partner, or the addition of new limited partners, does not necessarily dissolve the association. Sections 8, 16 (2b). No limited partner, however, can withdraw his contribution until all liabilities to creditors are paid. Section 16 (1a).

Seventh. As limited partners are not principals in transactions of the partnership, their liability except for known false statements in the certificate (section 7), is to the partnership, not to creditors of the partnership (section 17). The general partners cannot, however, waive any liability of the limited partners to the prejudice of such creditors. Section 17 (3).

Respectfully submitted,

New York Legislative Drafting Association,

By Wm. Draper Lewis, Draftsman.

Section 1. [Limited Partnership Defined.] A limited partnership is a partnership formed by two or more persons under the provisions of section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

Section 2. [Formation.] (1) Two or more persons desiring to form a limited partnership shall

(a) Sign and swear to a certificate, which shall state

I. The name of the partnership,

II. The character of the business,

III. The location of the principal place of business,

IV. The name and place of residence of each member; general and limited partners being respectively designated.

V. The term for which the partnership is to exist,

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned.

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an as-

signee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(b) File for record the certificate in the office of [here designate the proper office].

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1).

Section 3. [Business Which may be Carried on.] A limited partnership may carry on any business which a partnership without limited partners may carry on, except [here designate the business to be prohibited].

Section 4. [Character of Limited Partner's Contribution.] The contributions of a limited partner may be cash or other property, but not services.

Section 5. [A Name Not to Contain Surname of Limited Partner—Exceptions.] (1) The surname of a limited partner shall not appear in the partnership name, unless

(a) It is also the surname of a general partner, or

(b) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner.

Section 6. [Liability for False Statements in Certificate.] If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false.

(a) At the time he signed the certificate, or

(b) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in section 25 (3).

Section 7. [Limited Partner Not Liable to Creditors.] A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.

Section 8. [Admission of Additional Limited Partners.] After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of section 25.

Section 9. [Rights, Powers and Liabilities of a General Partner.] (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(a) Do any act in contravention of the certificate,

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership,

(c) Confess a judgment against the partnership,

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(e) Admit a person as a general partner,

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate,

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

Section 10. [Rights of a Limited Partner.] (1) A limited partner shall have the same rights as a general partner to

(a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,

(b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

(c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in sections 15 and 16.

Section 11. [Status of Person Erroneously Believing Himself a Limited Partner.] A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

Section 12. [One Person Both General and Limited Partner.] (1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all the

restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner.

Section 13. [Loans and Other Business Transactions with Limited Partner.] (1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a pro rata share of the assets. No limited partner shall in respect to any such claim

(a) Receive or hold as collateral security any partnership property, or

(b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership.

Section 14. [Relation of Limited Partners Inter Se.] Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing.

Section 15. [Compensation of Limited Partner.] A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; provided, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners.

Section 16. [Withdrawal or Reduction of Limited Partner's Contribution.] (1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and

(c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution

(a) On the dissolution of a partnership, or

(b) When the date specified in the certificate for its return has arrived, or

(c) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

(3) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(4) A limited partner may have the partnership dissolved and its affairs wound up when

(a) He rightfully but unsuccessfully demands the return of his contribution, or

(b) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph (1a) and the limited partner would otherwise be entitled to the return of his contribution.

Section 17. [Liability of Limited Partner to Partnership.] (1) A limited partner is liable to the partnership

(a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(b) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

(2) A limited partner holds as trustee for the partnership

(a) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

(b) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership, who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

Section 18. [Nature of Limited Partner's Interest in Partnership.] A limited partner's interest in the partnership is personal property.

Section 19. [Assignment of Limited Partner's Interest.] (1) A limited partner's interest is assignable.

(2) A substituted limited partner is a person admitted to all the

rights of a limited partner who has died or has assigned his interest in a partnership.

(3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substituted limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(5) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with section 25.

(6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

(7) The substitution of the assignee as a limited partner does not release the assignor from liability to the partnership under sections 6 and 17.

Section 20. [Effect of Retirement, Death or Insanity of a General Partner.] The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

(a) Under a right so to do stated in the certificate, or

(b) With the consent of all members.

Section 21. [Death of Limited Partner.] (1) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

(2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner.

Section 22. [Rights of Creditors of Limited Partner.] (1) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.[40]

[40] In those states where a creditor on beginning an action can attach debts due the defendant before he has obtained a judgment against the defendant it is recommended that paragraph (1) of this section read as follows:

"On due application to a court of competent jurisdiction by any creditor of a limited partner, the court may charge the interest of the indebted limited

(2) The interest may be redeemed with the separate property of any general partner, but may not be redeemed with partnership property.

(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.

(4) Nothing in this act shall be held to deprive a limited partner of his statutory exemption.

Section 23. [Distribution of Assets.] (1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order:

(a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners,

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(c) Those to limited partners in respect to the capital of their contributions,

(d) Those to general partners other than for capital and profits,

(e) Those to general partners in respect to profits,

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital, and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims.

Section 24. [When Certificate Shall be Canceled or Amended.] (1) The certificate shall be canceled when the partnership is dissolved or all limited partners cease to be such.

(2) A certificate shall be amended when

(a) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,

(b) A person is substituted as a limited partner,

(c) An additional limited partner is admitted,

(d) A person is admitted as a general partner,

(e) A general partner retires, dies or becomes insane, and the business is continued under section 20,

(f) There is a change in the character of the business of the partnership,

(g) There is a false or erroneous statement in the certificate,

(h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,

(i) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or

partner with payment of the unsatisfied amount of such claims; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require."

(j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them.

Section 25. [Requirements for Amendment and for Cancellation of Certificate.] (1) The writing to amend a certificate shall

(a) Conform to the requirements of section 2 (1a) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

(b) Be signed and sworn to by all members, and an amendment substituting a limited partner or adding a limited or general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs (1) and (2) as a person who must execute the writing refuses to do so, may petition the [here designate the proper court] to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the [here designate the responsible official in the office designated in section 2] in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(5) A certificate is amended or cancelled when there is filed for record in the office [here designate the office designated in section 2] where the certificate is recorded

(a) A writing in accordance with the provisions of paragraph (1) or (2), or

(b) A certified copy of the order of court in accordance with the provisions of paragraph (4).

(6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this act.

Section 26. [Parties to Actions.] A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

Section 27. [Name of Act.] This act may be cited as the Uniform Limited Partnership Act.

Section 28. [Rules of Construction.] (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this act.

(2) This act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This act shall not be so construed as to impair the obligations of any contract existing when the act goes into effect, nor to affect any action on proceedings begun or right accrued before this act takes effect.

Section 29. [Rules for Cases Not Provided for in this Act.] In any case not provided for in this act the rules of law and equity, including the law merchant, shall govern.

Section 30. [Provisions for Existing Limited Partnerships.] (1) A limited partnership formed under any statute of this state prior to the adoption of this act, may become a limited partnership under this act by complying with the provisions of section 2: Provided the certificate sets forth

(a) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership formed under any statute of this state prior to the adoption of this act, until or unless it becomes a limited partnership under this act, shall continue to be governed by the provisions of [here insert proper reference to the existing limited partnership act or acts], except that such partnership shall not be renewed unless so provided in the original agreement.

Section 31. [Act (Acts) Repealed.] Except as affecting existing limited partnerships to the extent set forth in section 30, the act (acts) of [here designate the existing limited partnership act or acts] is (are) hereby repealed.

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